No. 14-6166

Title:	David Anthony Taylor, Petitioner
	v.
	United States
Docketed:	September 9, 2014
Lower Ct:	United States Court of Appeals for the Fourth Circuit
Case Nos.:	(13-4316)
Decision Date:	June 6, 2014

Questions Presented

---Date---	------Proceedings and Orders----------
Sep 4 2014	Petition for a writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due October 9, 2014)
Sep 30 2014	Order extending time to file response to petition to and including November 10, 2014.
Nov 7 2014	Order further extending time to file response to petition to and including December 10, 2014.
Dec 8 2014	Order further extending time to file response to petition to and including January 9, 2015.
Jan 5 2015	Order further extending time to file response to petition to and including February 17, 2015.
Feb 18 2015	Order further extending time to file response to petition to and including March 19, 2015.
Mar 17 2015	Order further extending time to file response to petition to and including April 20, 2015.
Apr 20 2015	Order further extending time to file response to petition to and including May 20, 2015.
May 20 2015	Order further extending time to file response to petition to and including June 3, 2015.
Jun 3 2015	Order further extending time to file response to petition to and including July 6, 2015.
Jul 6 2015	Brief of respondent United States in opposition filed.
Jul 23 2015	DISTRIBUTED for Conference of September 28, 2015.
Oct 1 2015	Motion to proceed in forma pauperis and petition for a writ of certiorari GRANTED.
Nov 12 2015	The time to file the joint appendix and petitioner's brief on the merits is extended to and including November 30, 2015.
Nov 12 2015	The time to file respondent's brief on the merits is extended to and including January 13, 2016.
Nov 30 2015	Joint appendix filed. (Statement of costs filed.)
Nov 30 2015	Supplemental joint appendix volume filed.
Nov 30 2015	Brief of petitioner David Anthony Taylor filed.
Dec 23 2015	SET FOR ARGUMENT ON Tuesday, February 23, 2016
Jan 4 2016	Record requested from U.S.C.A. 4th Circuit.
Jan 8 2016	Record received from the U.S.C.A. 4th Circuit is electronic and located on PACER, with

	the exception of a SEALED appendix Volume III, which is also electronic.
Jan 13 2016	Brief of respondent United States filed.
Jan 15 2016	CIRCULATED.
Feb 12 2016	Reply of petitioner David Anthony Taylor filed. (Distributed)
Feb 23 2016	Argued. For petitioner: Dennis E. Jones, Abingdon, Va. For respondent: Anthony A. Yang, Assistant to the Solicitor General, Department of Justice, Washington, D.C.

RECORD AND BRIEFS

No. 14-6166

ORIGINAL

IN THE
SUPREME COURT OF THE UNITED STATES

DAVID ANTHONY TAYLOR,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

Supreme Court, U.S.
FILED
SEP - 4 2014
OFFICE OF THE CLERK

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

The petitioner asks leave to file the attached petition for a writ of certiorari without prepayment of costs and to proceed *in forma pauperis*

Petitioner has previously been granted leave to proceed *in forma pauperis* in the following court[s]:

U.S. District Court for the Western District of Virginia, Case No. 7:12-cr-00043, by order dated May 30, 2012; and

U.S. Court of Appeals for the Fourth Circuit, Case No. 13-4316, by order dated May 6, 2013.

Because appellate counsel was appointed pursuant to the Criminal Justice Act of 1984, 18 U.S.C. § 3006A, no affidavit or declaration of the petitioner is attached. *See S. Ct.* R. 39.1.

September 4, 2014

Respectfully submitted,

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Counsel of Record for Mr. Taylor

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RECORD NO._____

14-6166

ORIGINAL

In The
Supreme Court of The United States

DAVID ANTHONY TAYLOR,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent.

Supreme Court, U.S.
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ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, in a federal criminal prosecution under the Hobbs Act, 18 U.S.C. §1951, the Government is relieved of proving beyond a reasonable doubt the interstate commerce element by relying exclusively on evidence that the robbery or attempted robbery of a drug dealer is an inherent economic enterprise that satisfies, as a matter of law, the interstate commerce element of the offense.

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

DAVID ANTHONY TAYLOR,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioner David Anthony Taylor respectfully requests the issuance of a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

I. OPINION BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is published and contained in Appendix A. *United States v.* Taylor 754 F.3d 217 (2014). App., *infra*, A-1.

II. JURISDICTION

The Court of Appeals entered its judgment on June 6, 2014. The jurisdiction of this Court to review this petition is conferred by 28 U.S.C. §1254(1). The petition is being filed 90 days from the date of the decision of the Court of Appeals.

III. STATUTORY PROVISION INVOLVED

18 U.S.C. § 1951 states:

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both.

(b) As used in this section–

(1) The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

(3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

IV. STATEMENT OF THE CASE

Factual Background

On July 26, 2012 David Anthony Taylor ("Taylor") was named in a 4-count superseding indictment that charged him with two counts of robbery in violation of 18 U.S.C. §1951(a), commonly referred to as the "Hobbs Act" and two counts of using a firearm in furtherance of a crime of violence in violation of 18 U.S.C. §924(c).

The first robbery count was with respect to the alleged robbery of marijuana and drug proceeds from one William Thomas Lynch ("Lynch") on 3030 Parham Drive, Roanoke, Virginia which occurred on October 21, 2009. The second alleged robbery of marijuana and drug proceeds from one Josh Worley ("Worley") on 3343 Ridgerun, Roanoke, Virginia which occurred on August 27, 2009.

Mr. Taylor was tried by a jury in the Western District of Virginia, Roanoke Division on October 22 – 24, 2012 which resulted in a hung jury.

Mr. Taylor was again tried by jury on January 23 – 25, 2013. He was acquitted of one count of possession a firearm in furtherance of a robbery. He was convicted of two counts charging a violation of 18 U.S.C. §1951(a) and one count charging a violation of 18 U.S.C. §924(c).

Pretrial Motion

On December 12, 2012 the Government filed a Motion in Limine to preclude the introduction of evidence or argument by Mr. Taylor that marijuana dealers dealing in marijuana grown "in-state" would have no effect interstate commerce and

therefore not be a violation of the Hobbs Act. The Government relied upon *United States v. Williams,* 342 F.3d 350 (4th Cir. 2003) in support of their Motion. The District Court conducted a motion hearing on January 3, 2013 at the conclusion of which the Motion in Limine was granted, precluding the introduction of evidence or argument that "in-state" grown marijuana would have no effect on interstate commerce.

Evidence with Respect to the Robbery of Worley

The Government's case against Taylor for the robbery of Worley was comprised principally of the testimony of cooperating witnesses, George Fitzgerald ("Fitzgerald"), the organizer of the robberies and Anthony Claytor ("Claytor"), an accomplice.

According to the testimony of Fitzgerald, he, Claytor, Taylor and Dejuan Lemons ("Lemons") on the evening of August 27, 2009 travelled to 3433 Ridgerun, Roanoke, Virginia with the intent to rob Worley. Fitzgerald had been told that Worley was a marijuana dealer with access to drugs and cash. Fitzgerald had no specific knowledge that drugs would be found.

Upon arriving at the residence Taylor kicked the door open. Taylor, Lemons and Fitzgerald entered the residence and made their way to the bedroom where Worley and his liv-in girlfriend, Latasha Graham ("Graham") were found. Claytor waited outside the residence.

During the course of the robbery no marijuana, drugs or money was found by the trio. Fitzgerald testified that Taylor removed rings from the finger of Graham,

taking the rings and some money from a pocketbook on the bedroom dresser. The trio then left the Worley residence.

Worley, age 24, testified that he resided in the residence with his girlfriend, Graham, and her two children. He provided testimony that he was not a drug dealer and specifically was not selling marijuana. He testified that he had no drugs or money in the residence at the time of the robbery.

Graham, age 27, testified that on the evening of August 27, 2009 three men came into their bedroom and they were robbed. Graham had smoked marijuana from high school up to the time of the robbery, but neither she nor Worley sold marijuana or any other drugs. When the three men entered the bedroom they stated they were looking for money and weed and she advised they didn't have any. The net proceeds taken during the robbery was $40 and jewelry.

There was no testimony that either Worley, Graham or the children residing in the residence were drug dealers or that anyone possess marijuana or any other narcotics at the time of the robbery.

Evidence with Respect to the Robbery of Lynch

Fitzgerald was again called by the Government as a principal witness in the Lynch robbery. He testified that a Chris Nichols and his cousin had robbed a guy for 20 pounds of marijuana in front of the Lynch residence and that he expected to find marijuana and probably money. The Lynch robbery was carried out by himself, Lemons and Taylor. After entering the residence the trio controlled the residents and Fitzgerald questioned Lynch about the presence of weed. Lynch denied that

there was weed in the house and stated a guy named Mark had weed. After determining that there was no weed or money in the residence the trio left the residence.

During questioning by the District Court, Fitzgerald testified they were operating in the blind and didn't know if there would be marijuana and/or money present. This was described by Fitzgerald as a "hit or miss" operation.

Whitney Lynch, wife of Lynch, testified that she was in a bedroom when the trio entered and that she was questioned about money and weed repeatedly, but responded that they had no money, weed or safe. During the time the trio was in the Lynch residence the only thing that was taken was a cell phone. Following a thorough search of the residence one of the three said "everybody out of the house, let's go" and the trio then left. Mrs. Lynch testified on cross examination that neither she nor her husband dealt in drugs, including but not limited to marijuana and that she had no knowledge of a previous drug robbery at or near her home of 20 pounds of marijuana.

At all times during the trial the Government's key witness, Fitzgerald the organizer of the robberies, testified that the target of the robberies was limited to marijuana dealers. There was no testimony that marijuana traveled in interstate commerce or that sales were made to customers who traveled interstate for the purpose of making such purposes. Of equal importance there was no stipulation of fact by Taylor that marijuana traveled in interstate commerce.

Trial Court Disposition

At the conclusion of the evidence the District Court in accordance with *Williams, supra,* instructed the jury on the element of interstate commerce that the government had met its burden of proof if the jury finds and believes from the evidence beyond a reasonable doubt that Taylor reduced the movement of articles and commodities in interstate commerce, illegal drugs and drug proceeds, or attempted to do so by the robberies as charged.

Appellate Proceedings

On appeal it was urged by Taylor, that the Government must prove beyond a reasonable doubt that the marijuana and drug proceeds made the subject of the indictment traveled in or effected interstate commerce. The Fourth Circuit Court of Appeals considered this argument, but rejected it by holding that marijuana dealers fall within the classification of drug dealers whose business per se affects interstate commerce.

V. REASONS FOR GRANTING THE PETITION

This case raises an important question regarding the Government's evidentiary burdens in robbery and attempted robbery prosecutions under the Hobbs Act.

Can the Government rely exclusively on generalized evidence that robbery or attempted robbery of a drug dealer satisfies the interstate commerce jurisdictional prong of the Hobbs Act? The Fourth Circuit's holding that drug dealing is an inherently economic enterprise that affects interstate commerce and as such the

robbery of a drug dealer is the kind of act which *per se* satisfies the affecting commerce element of the Hobbs Act relieves the Government of proving the interstate commerce element of the offense. This ruling is in direct conflict with the Seventh Circuit's decision in *United States v. Peterson,* 236 F.3d 848 (7th Cir. 2001), and the Second Circuit's decision in *United States v. Needham,* 604 F.3d 673 (2nd Cir. 2010) which hold that such generalized evidence is insufficient to satisfy the jurisdictional prong of the Hobbs Act, particularly where marijuana is grown in the state where the robbery allegedly occurred. *Peterson, supra,* and *Needham, supra,* require individualized proof beyond a reasonable that the robbery charged affected interstate commerce in order to sustain a Hobbs Act conviction.

Moreover, if allowed to stand, the Fourth Circuit's decision will turn the Hobbs Act from a narrowly tailored criminal statute targeted at punishing interstate robbery to an expansive federal regime that criminalizes at the national level all robberies involving illegal drugs. Such an usurpation of the rights of the states to regulate local criminal conduct, including drug related robberies, was neither contemplated by Congress, nor is it permitted by the Constitution.

I. THE FOURTH CIRCUIT'S RULING THAT ROBBERY OF A DRUG DEALER SATISFIES THE "AFFECTING COMMERCE" ELEMENT OF THE HOBBS ACT CREATES A CIRCUIT SPLIT WITH THE SEVENTH AND SECOND CIRCUIT.

In *United States v. Lopez,* 514 U.S. 549, 115 S. Ct. 1624 (1995) and *United States v. Morrison,* 529 U.S. 598, 120 S. Ct. 1740 (200), the Court explicitly rejected the proposition that "Congress may regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce." *Morrison,*

529 U.S. at 617. Rather, "[t]he regulation and punishment of intrastate violence that is not directed at the instrumentalities, channels, or goods involved in interstate commerce has always been the province of the States." *Morrison,* 529 U.S. 618.

As the Court explained in *Morrison*, "we can think of no better example of the police power, which the Founders denied the National Government and reposed in the States, that the suppression of violent crimes and the vindication of its victims." 529 U.S. at 618. Thus, to ensure that Congress does not unconstitutionally encroach on the States' police power, in determining the constitutionality of federal criminal statutes, the Court has looked to whether the statute at issue contains a "jurisdictional element which would ensure, through case-by-case inquiry" that the alleged criminal conduct "affects interstate commerce." *Lopez,* 514 U.S. at 561; *see Morrison,* 529 U.S. at 613 (striking down the Violence Against Women Act, in part, because it "contains no jurisdictional element establishing that the federal cause of action is in pursuance of Congress' power to regulate interstate commerce.").

Unlike the federal laws struck down in *Lopez* and *Morrison,* Congress explicitly included a jurisdictional element in the Hobbs Act. *See* §1951(a) ("Whoever in any way or degree obstructs, delays or affects commerce or the movement of any article or commodity in commerce, by robbery . . . shall be fined . . . or imprisoned . . .."); *Stirone v. United States,* 361 U.S. 212, 218, 80 S. Ct. 270 (1960) ("[T]here are two essential element of a Hobbs Act crime: interference with commerce and extortion."); *see also United States v. Wilkerson,* 361 F.3d 717, 726

(2nd Cir. 2004) ("In a Hobbs Act prosecution, proof that commerce was affected is critical since the Federal Government's jurisdiction of this crime rests only on that interference." (internal quotation marks and alterations omitted)).[1]

Consequently, to obtain a Hobbs Act conviction, the Government must present sufficient evidence – and a jury must find – that the alleged robbery or attempted robbery had an effect on interstate commerce. *See, Stiorne,* 361 At 218; *Peterson,* 236 F.3d 855 (explaining that "the Hobbs Act requires individualized proof that the robbery charged affected interstate commerce"); *see* also *United States v. Gaudin,* 515 U.S. 506, 511, 115 S.Ct. 2310 (1955) ("The Constitution gives a criminal defendant the right to demand that a jury find him guilty of all the elements of the crime with which he is charges . . ..").

As the Seventh Circuit has held, such a showing can be made only through the submission of particularized evidence that would permit a jury to conclude on a case-specific basis, that the defendant's crime affected interstate commerce. In *United States v. Peterson, supra,* a case almost identical to this one, the Seventh Circuit clarified the Government's evidentiary burden in Hobbs Act robbery cases involving marijuana. *See Peterson,* 236 F.3d 848. Like Taylor, the defendants in

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[1] Because the Hobbs Act contains a jurisdictional element, this Court's decision in *Gonzales v. Raich,* 545 U.S. 1, 125 S. Ct. 2195 (2005) is not implicated. *See Needham,* 604 F.3d at 683-684 ("Thus, while *Raich* found that the CSA could be applied to purely intrastate cultivation and sale of marijuana, it considered only Congress's broad power to regulate drug offenses under the Commerce Clause. The Court did not purport to interpret the Hobbs Act, where Congress chose to require proof of an interstate nexus in each individual case. The difference between these two enterprises – Congress's ability to regulate a class of economic activity, versus the specific interstate effects of one transaction or offense – is obvious.")

Peterson were charged under the Hobbs Act for the robbery of a man named Estep who "sold marijuana from his . . . home" in Indiana. *Id. at* 850. At trial, the Government submitted no evidence regarding the interstate nature of Estep's drug trafficking operation. Rather, the Government relied on testimony from a DEA Special Agent who testified that "even though it was 'possible' for marijuana to be Indiana grown, it was 'highly unlikely.'" *Id. at* 855.

In vacating the robbery convictions, the Seventh Circuit rejected the Government's contention that "it need not specifically show that the drugs were grown outside Indiana." *Id.* Instead, the court held that the Government's proof "should have focused on the nature of the business robbed and how the robbery affected its operation in interstate commerce; that is to say, that Estep sold drugs from an out-of-state source and that the robbery of the money and drugs depleted the assets of his business." *Id. at* 856.

In *United States v. Needham, supra,* the Second Circuit rejected the "view that an interstate effect can be presumed wherever the object of a robbery was to obtain illegal drugs or drug proceeds. Instead, we have held that this element must be found by a jury beyond a reasonable doubt, even where the robbery targets a drug trafficking operation." *Needham* 604 F.3d at 679; *see also United States v. Parkes,* 497 F.3d 220 at 230 (2nd Cir. 2007) ("[W]e conclude that the Hobbs Act requires the jury to determine, beyond a reasonable doubt, whether the conduct affected, or would have affected, interstate commerce . . ..").

In *United States v. Needham, supra* a similar jury instruction was given as was given in Taylor's case. "Under the law, all illegal drug activity, even if it is purely local in nature, has an effect on interstate commerce. Therefore, if you find that the object of the robbery at issue was to obtain illegal drugs or money earned from the sale of illegal drugs, this element is satisfied." *Needham*, 604 F.3d at 678. "I tell you that the government has met its burden of proof if you find and believe from the evidence beyond a reasonable doubt that the defendant reduced the movement of articles and commodities in interstate commerce, in this case illegal drugs and drug proceeds, or attempted to do so by the robberies charged in Counts One and Three." *United States v. Taylor*, 754 F.3d. 217, 221 (4th Cir. 2014). As a matter of law under each instruction the robbery of a drug dealer satisfies the interstate commerce element of the Hobbs Act. The *Needham* Court citing *United States v. Parkes, supra,* reversed the conviction involving the robbery of marijuana dealers holding "Proof of drug trafficking is no longer regarded as automatically affecting interstate commerce; instead, even in drug case, the jury must find such an effect as part of its verdict." *United States v. Needham,* 604 F.3d at 678.

In *United States v. Parkes, supra,* the defendant robbed "a local, part-time marijuana dealer" named Medina. *Id. at* 231. The dealer's place of business was a "little room" that contained "one large bag containing marijuana, 58 smaller 'nickel bags,' and 44,000 in cash." *Id.* The Government submitted no additional evidence regarding "Medina's drug-dealing business; *i.e.* the origin of his marijuana, his suppliers, the route and instrumentality of delivery to Medina, his buyers or his use

of the proceeds from drug sales." *Id. at* 226 (footnote omitted). Rather, in an effort to satisfy the jurisdictional prong of the Hobbs Act, the Government relied exclusively on testimony from "an experienced narcotics investigator" that "marijuana 'is almost exclusively trucked into the United States'" and "Very little' marijuana is grown in New York." *Id. at* 23 (alteration omitted). Notwithstanding that witness' concession to the undeniable fact that "marijuana is grown within New York State," *id.* The Second Circuit concluded the evidence submitted by the Government was sufficient to meet the burden of proof requiring the government prove an effect on interstate commerce.

In sharp contrast the Fourth Circuit has held that "Drug dealing, to repeat, is an inherently economic enterprise that affects interstate commerce. For this reason, the robbery of a drug dealer has been found to be the kind of act which satisfies the "affecting commerce" element of the Hobbs Act, inasmuch as such a robbery depletes the business assets of the drug dealer." *United States v. Williams,* 342 F.3d 355. The ruling of *Williams* relieves the Government of proving the Hobbs Act element of having an effect on interstate commerce by proving the target of the robbery is a drug dealer.

The Court should grant certiorari to resolve this conflict between the Fourth, Second and Seventh Circuit and hold that the robbery of a drug dealer does not *per se* satisfy the interstate commerce jurisdiction element of the Hobbs Act. Rather – consistent with the requirements of the Hobbs Act and the Commerce Clause of the Constitution – the Government must be required to submit particularized evidence

that the alleged victim engaged in and/or effected interstate commerce as an element of the offense.

VI. CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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RECORD NO._____

In The
Supreme Court of The United States

DAVID ANTHONY TAYLOR,

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v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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Of the United States Court of Appeals for the Fourth Circuit
No. 13-4316, decided June 6, 2014

Appendix A

United States Court of Appeals for the Fourth Circuit
Published Opinion, No. 13-4316
United States v. David Anthony Taylor
decided June 6, 2014

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 13-4316

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

DAVID ANTHONY TAYLOR,

Defendant - Appellant.

Appeal from the United States District Court for the Western District of Virginia, at Roanoke. Glen E. Conrad, Chief District Judge. (7:12-cr-00043-GEC-1)

Argued: May 15, 2014 Decided: June 6, 2014

Before WILKINSON and THACKER, Circuit Judges, and HAMILTON, Senior Circuit Judge.

Affirmed by published opinion. Judge Wilkinson wrote the opinion, in which Judge Thacker and Senior Judge Hamilton joined.

ARGUED: Kari Elizabeth Jackson, Dennis Jones, DENNIS E. JONES & ASSOCIATES, Abingdon, Virginia, for Appellant. Jean Barrett Hudson, OFFICE OF THE UNITED STATES ATTORNEY, Charlottesville, Virginia, for Appellee. **ON BRIEF**: Timothy J. Heaphy, United States Attorney, Roanoke, Virginia, Anne H. Lippitt, Third Year Law Student, OFFICE OF THE UNITED STATES ATTORNEY, Charlottesville, Virginia, for Appellee.

WILKINSON, Circuit Judge:

David Anthony Taylor appeals his convictions for two counts of Hobbs Act robbery in violation of 18 U.S.C. § 1951(a) and one count of using a firearm in furtherance of a crime of violence in violation of 18 U.S.C. § 924(c). Taylor contends both that the government failed to introduce sufficient evidence to establish that his robberies affected interstate commerce and that the district court erred in prohibiting him from showing that the particular drugs he was seeking to steal did not affect interstate commerce. Pursuant to Supreme Court precedent supporting the broad ability of Congress to punish the disruption of interstate commerce and our own conforming decisions in United States v. Tillery, 702 F.3d 170 (4th Cir. 2012), and United States v. Williams, 342 F.3d 350 (4th Cir. 2003), we affirm his convictions.

I.

A.

Taylor was a member of the "Southwest Goonz," a group of robbers led by George Fitzgerald and based in Roanoke, Virginia. The Goonz focused on robbing drug dealers because they typically have drug proceeds in their homes and, because of the illegal nature of their activities, they are reluctant to report crime to the authorities. Taylor persuaded Fitzgerald to take him on

several planned home invasions in order to steal drugs and drug proceeds, such as money and jewelry.

One of these break-ins was planned for the residence of Josh Whorley, where his girlfriend Latasha Graham and her two children also lived. Fitzgerald chose Whorley's home because he had learned that Whorley sold an exotic and high grade of marijuana, a belief that he communicated to Taylor and two other group members. The robbers expected to find both drugs and money there.

Their expectations were not unreasonable, because Whorley had both used and sold drugs in the past. Graham herself was a regular marijuana user. Additionally, Whorley's house had been broken into twice prior to the August 27, 2009 robbery, and a housemate had been held at gunpoint in the driveway.

Taylor and his associates robbed Whorley's house on the night of August 27. The four robbers kicked in the front door and held guns to Whorley and Graham while searching the house. During the robbery, Taylor hit Graham in the head with his pistol, groped her, and clawed the rings off her fingers. Whorley was also repeatedly struck by one of the robbers. The robbers demanded that Graham tell them where the money and marijuana were located. All in all, the robbers made off with Graham's jewelry, $40 from her purse, two cell phones, and a marijuana cigarette.

Another break-in was planned for the home of William Lynch, who lived together with his wife, Whitney Lynch, and their three children. Fitzgerald chose Lynch's home because he had been told by a previously reliable source that Lynch sold marijuana. The source further informed Fitzgerald that on a prior occasion he had personally robbed Lynch, also known as "W.T.," of twenty pounds of marijuana. Lynch surrounded himself with people who used and possessed drugs. Taylor and Fitzgerald both expected to recover marijuana and drug proceeds during the home invasion.

The Goonz robbed Lynch's residence on October 21, 2009. Taylor initiated the robbery by knocking on the front door. After he entered the home, Fitzgerald and another group member followed. Once inside, Taylor held Lynch and his six-year old son at gunpoint in the living room, while another robber forced Lynch's nine-year old daughter from her bedroom into the living room. Fitzgerald asked Lynch to tell him where the marijuana was located. Lynch insisted that he did not have it and claimed that it was in another man's possession. Whitney Lynch emerged from her bedroom at the sound of the commotion and was assaulted by a robber, who attempted to remove her pants. She struggled with him while he demanded that she show him where the money and drugs were located. She was then dragged into the living room by her hair. The three robbers eventually took Lynch's cell phone and departed.

B.

On July 26, 2012, Taylor was indicted by a grand jury in the Western District of Virginia on two counts of Hobbs Act robbery under 18 U.S.C. § 1951(a) and two counts of using a firearm in furtherance of a crime of violence under 18 U.S.C. § 924(c). Taylor's first trial resulted in a hung jury.

A second trial was conducted from January 23 to 25, 2013. Before the second trial commenced, the government moved to preclude Taylor from offering evidence that robbing a drug dealer who sells marijuana grown within the borders of Virginia does not affect interstate commerce and thus does not violate the Hobbs Act. Taylor filed a Motion to Dismiss, contending that such a ruling would violate his constitutional right to present a complete defense. The district court held a hearing after which it granted the government's motion on the grounds that the enterprise of drug dealing affects interstate commerce as a matter of law under United States v. Williams, 342 F.3d 350 (4th Cir. 2003). See also United States v. Tillery, 702 F.3d 170, 175 (4th Cir. 2012) (upholding conviction for Hobbs Act robbery of a business because it impacted interstate commerce "in the aggregate").

On January 25, the jury convicted Taylor on three of the four counts in the indictment, including both of the Hobbs Act offenses. With regard to the Hobbs Act crimes, the jury found

Taylor guilty of "knowingly and unlawfully taking and obtaining, or attempting to take or obtain, by robbery, items having an effect on interstate commerce by means of actual and threatened force, violence, and fear of injury." J.A. 702. Taylor moved to set aside the verdict on the basis that the government had not offered evidence that Taylor's actions had affected interstate commerce. The district court denied Taylor's motion. The court then sentenced Taylor to 336 months in prison followed by supervised release for three years. Taylor now appeals.

II.

Taylor argues that the government failed to present sufficient evidence that his robberies affected interstate commerce under the Hobbs Act. He also contends that the district court erred in prohibiting him from showing that his robberies of dealers of Virginia-grown marijuana likely did not impact interstate commerce.

A.

We note at the outset the extraordinary breadth and reach of the Hobbs Act. That law reads, in pertinent part:

> Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be [punished].

18 U.S.C. § 1951(a). A Hobbs Act crime, then, has two elements: "(1) robbery or extortion, and (2) interference with commerce." Tillery, 702 at 174. With regard to the second element, it is impossible to ignore Congress' repeated use of the word "any." Indeed, the Supreme Court has recognized that the Hobbs Act "speaks in broad language, manifesting a purpose to use all the constitutional power Congress has to punish interference with interstate commerce . . . ." Stirone v. United States, 361 U.S. 212, 215 (1960). Thus, the jurisdictional predicate of the Hobbs Act requires only that the government prove a "minimal" effect on interstate commerce. United States v. Spagnolo, 546 F.2d 1117, 1119 (4th Cir. 1976).

Such an impact is not difficult to show. The effect may be so minor as to be de minimis, United States v. Buffey, 899 F.2d 1402, 1404 (4th Cir. 1990), and may be demonstrated by "proof of probabilities," United States v. Brantley, 777 F.2d 159, 162 (4th Cir. 1985). Moreover, the government is not required to prove that the "defendant intended to affect commerce or that the effect on commerce was certain; it is enough that such an effect was the natural, probable consequence of the defendant's actions." Williams, 342 F.3d at 354.

To determine whether a robbery affects commerce, we do not simply examine the effect of the individual action in question;

it is sufficient that the "relevant class of acts" has a measureable impact on interstate commerce. Tillery, 702 F.3d at 174 (internal quotation marks omitted). Considering the class of activities in the aggregate in order to determine whether they impact interstate commerce is nothing new. The Supreme Court has repeatedly found that Congress may regulate conduct under the Commerce Clause that, in the aggregate, impacts interstate commerce. See, e.g., Gonzales v. Raich, 545 U.S. 1, 18-19, 22 (2005) (holding that Congress may regulate intrastate marijuana market because of its aggregate impact on interstate commerce); Wickard v. Filburn, 317 U.S. 111, 128-29 (1942) (finding that Congress is permitted to regulate activities that, when "taken together with th[ose] of many others similarly situated," have an effect on interstate commerce).

We have likewise recognized that, because the Hobbs Act reflects the full breadth of Congress' commerce power, the aggregation principle applies in the Hobbs Act context. See Tillery, 702 F.3d at 174-75; Williams, 342 F.3d at 355. Indeed, to focus exclusively on an individual act would wholly undermine Congress' purpose in adopting the Hobbs Act: to protect commercial, interstate activity from criminal disruption. See United States v. Culbert, 435 U.S. 371, 373 (1978) (finding that the words of the Hobbs Act "do not lend themselves to restrictive interpretation").

In so ruling, we note the large number of circuits that agree that the aggregation principle applies in the context of a Hobbs Act violation. See United States v. Powell, 693 F.3d 398, 402 (3d Cir. 2012) ("[B]ecause the Hobbs Act contains a jurisdictional element and criminalizes the 'fundamentally economic' crimes of robbery and extortion, violations of the Act have a substantial effect on interstate commerce in the aggregate, and the government need not prove a substantial effect in each individual case.") (citations omitted); United States v. Robinson, 119 F.3d 1205, 1214 (5th Cir. 1997) (same); United States v. Davis, 473 F.3d 680, 683 (6th Cir. 2007) (same); United States v. Marrero, 299 F.3d 653, 655 (7th Cir. 2002) (same); United States v. Bolton, 68 F.3d 396, 399 (10th Cir. 1995) (same); United States v. Guerra, 164 F.3d 1358, 1361 (11th Cir. 1999) (same). "Any other rule would leave the federal government helpless to deal with criminal acts that have an individually trivial but cumulatively significant effect on the movement of goods and services across state and international boundaries." United States v. Thomas, 159 F.3d 296, 298 (7th Cir. 1998).

The requirement that the precise effect on commerce be traced in each and every case would not only damage the aggregation principle and the class of acts principle that underlies it; it would also raise concerns of practicality which

militate against a requirement of showing every charged crime's precise commercial effect. See Marrero, 299 F.3d at 655 ("Nor is it necessary that the individual criminal act . . . be shown to have a measurable impact on commerce, which would usually be impossible to show. It is enough if the class of acts has such an impact."). To the extent that United States v. Needham, 604 F.3d 673 (2d Cir. 2010), is in tension with our holding, we note simply the observation of Judge Cabranes that "'commerce' for purposes of the Hobbs Act -- that is, 'commerce over which the United States has jurisdiction,' 18 U.S.C. § 1951(b) -- encompasses marijuana that is grown, processed, and sold entirely within a single state." Id. at 688 (Cabranes, J., dissenting in part and concurring in part). If there is to be a "marijuana exception" to traditional Hobbs Act principles, that is a policy choice for the Congress to make. Until it does, we shall follow the plain lessons of Supreme Court cases and our own precedent, which must of necessity govern our disposition of this case.

It is of no relevance that the market for a certain commodity may be illegal. The jurisdictional predicate in the Hobbs Act speaks of "commerce," not just "legal" or "legitimate" commerce, and commerce is well understood to encompass unlawful transactions. See Raich, 545 U.S. at 18-19 (holding that the Commerce Clause empowers Congress to regulate and criminalize

the national market for marijuana). Drug dealing is a commercial enterprise and robberies of drug dealers threaten that enterprise; that is enough for a federal court to exercise jurisdiction under the Hobbs Act. See Williams, 342 F.3d at 354 (finding that "robberies of drug dealers . . . impact[] a trade that plainly is both economic and interstate in character").

Finally, it is not dispositive that the robberies involved the invasion of the victims' homes. Many businesses, including illegal drug enterprises, operate out of homes. As the Supreme Court has emphasized, commercial activities in or near the home may have a significant cumulative effect upon interstate commerce. See Raich, 545 U.S. at 19 (holding that, "when viewed in the aggregate, . . . Congress had a rational basis for concluding that leaving home-consumed marijuana outside federal control would . . . affect price and market conditions"); Wickard, 317 U.S. at 128 ("It can hardly be denied that a factor of such volume and variability as ho[illegible]consumed wheat would have a substantial influence on price and market conditions."). Thus, the locus of the commercial activity is not the litmus test of a Hobbs Act violation.

B.

We now turn to the merits of Taylor's claims. He first contends that the government was required to offer particularized evidence that his personal robberies affected

interstate commerce and that, because the government offered no such evidence, the district court lacked jurisdiction over his prosecution under the Hobbs Act. In an appeal contesting the sufficiency of the evidence, we view "the evidence and the reasonable inferences to be drawn therefrom in the light most favorable to the Government" and uphold the verdict if it is supported by substantial evidence. Williams, 342 F.3d at 355 (internal quotation marks omitted).

At the conclusion of trial, the district court instructed the jury on the jurisdictional element as follows:

> In considering . . . whether there has been an obstruction, delay, or effect on interstate commerce, I tell you that the government has met its burden of proof if you find and believe from the evidence beyond a reasonable doubt that the defendant reduced the movement of articles and commodities in interstate commerce, in this case illegal drugs and drug proceeds, or attempted to do so by the robberies charged in Counts One and Three.
>
> It is not necessary for the government to prove that the defendant intended to affect interstate commerce; rather, this element may be proven by evidence that a defendant's actions were likely to affect interstate commerce, even though the actual impact on commerce is small.

J.A. 673-74. These instructions were in accord with the law as described above and Taylor's argument thus rests solely on the sufficiency of the evidence with regard to the jurisdictional predicate. But while Taylor contends that the government failed

to prove the jurisdictional element, we find that the jury could rationally have found that the government met its burden.

First, it was entirely reasonable for the jury to conclude that the robberies "would have the effect of depleting the assets of an entity engaged in interstate commerce." Buffey, 899 F.2d at 1404. In Williams, we found that drug dealing was "an inherently economic enterprise that affects interstate commerce." 342 F.3d at 355. Although Williams involved cocaine and Taylor's robberies involved marijuana, the principle of aggregation does not apply differently for different drugs. See Raich, 545 U.S. at 18-19 (applying the aggregation principle to the market for marijuana). Because drug dealing in the aggregate necessarily affects interstate commerce, the government was simply required to prove that Taylor depleted or attempted to deplete the assets of such an operation.

Sufficient evidence was adduced at trial for a rational jury to find that Whorley was a drug dealer and that Taylor depleted or attempted to deplete his assets during the August 27 robbery. The record shows that the Goonz were in the business of robbing drug dealers, Fitzgerald testified that he selected Whorley's house to rob because he was informed that a drug dealer lived there, and testimony further revealed that Taylor took part in the robbery because he expected to find drugs and drug proceeds in the home. Furthermore, Whorley admitted to

having sold drugs in the past and Graham did in fact possess marijuana at the time of the robbery. A Roanoke City detective testified that drug dealers are commonly victims of repeated home invasions and that he suspected Whorley of being a drug dealer because Whorley's house had been broken into at least twice prior to the August 27 robbery.

Additionally, the money, jewelry, cell phones, and marijuana cigarette that Taylor stole are sufficient to meet the de minimis standard under the depletion-of-assets theory. "We have never held . . . that the depletion of assets theory has a dollar-amount minimum." Tillery, 702 F.3d at 175. But even if these items together do not meet that low threshold, the jury could rationally have concluded that Taylor attempted to steal drugs and drug proceeds, and therefore satisfied the Hobbs Act jurisdictional element. See Brantley, 777 F.2d at 163-64 (holding that Hobbs Act jurisdictional element may be satisfied by inchoate crimes).

Likewise, the government proffered sufficient evidence for a rational jury to conclude that Lynch was a drug dealer and that Taylor depleted or attempted to deplete his assets in the October 21 robbery. As with the robbery of Whorley, the Goonz was a group dedicated to robbing drug dealers. Fitzgerald testified that he had received intelligence from a reliable informant that Lynch was a drug dealer and had previously been

robbed of twenty pounds of marijuana. Additional testimony revealed that Taylor thought there would be drugs and drug proceeds in the house. Fitzgerald called Lynch by his nickname, "W.T.," and, when he demanded that Lynch hand over the drugs, Lynch told him that the marijuana was with another person. Moreover, a federal officer testified that Lynch admitted that he had sold drugs before the robbery without his wife's knowledge and Lynch's wife testified that he associated with suspicious characters who used and possessed illegal drugs. As with Whorley, the jury could rationally have found that Taylor attempted to deprive Lynch's operation of both drugs and drug proceeds and found jurisdiction accordingly. There was thus sufficient evidence at trial for the jury to have determined that the jurisdictional element was satisfied under a depletion-of-assets theory for both the Whorley and Lynch robberies.

Apart from the effect on the assets of an operation whose character involves interstate commerce, there was evidence that the defendant intentionally targeted a business engaged in interstate commerce. See Powell, 693 F.3d at 405. While evidence of the defendant's intent is not required to prove that his robberies had an impact on interstate commerce, that intent is still probative on the question of whether his actions would have had the "natural consequence[]" of affecting such commerce. See id. (finding jurisdictional element met because defendant

"deliberately sought to rob business owners to obtain proceeds of businesses engaged in interstate commerce").

Under the targeting theory, a defendant who robs a victim in the belief that he will recover the proceeds of an enterprise engaged in interstate commerce will not fortuitously escape prosecution under the Hobbs Act because his target did not possess those proceeds at the precise time of the robbery. See Brantley, 777 F.2d at 162 ("It may be enough [to prove the jurisdictional predicate] that the parties intended to complete a transaction which would have affected commerce, though their intention was frustrated."). The amount of cash on hand in a drug dealing enterprise fluctuates dramatically; the victims were doubtless targeted by Taylor and the other Goonz in the hope they would be found at a flush moment. That they were not does nothing to vitiate Taylor's intent to target an enterprise which by its nature engages in interstate commercial activity.

The evidence here was thus sufficient for two independent reasons. Whether viewed through the lens of the effect of the defendant's crimes (depletion of assets) or his intent (targeting), the government adduced sufficient evidence in this case to meet the jurisdictional element of the Hobbs Act. We

therefore sustain Taylor's Hobbs Act convictions.* As Taylor challenged his conviction for using or carrying a firearm in furtherance of a crime of violence under 18 U.S.C. § 924(c) solely on the ground that the Hobbs Act predicate was infirm, that conviction too must be upheld.

This is not to imply that the reach of the Hobbs Act is without limits. All robberies are disruptive, but not every disruption is an obstruction of commerce. The Sixth Circuit, for example, held that the jurisdictional element of the Hobbs Act was not satisfied when the defendant stood convicted of robbing "private citizens in a private residence" of money, some of which just happened to "belong[] to a restaurant doing business in interstate commerce." United States v. Wang, 222 F.3d 234, 240 (6th Cir. 2000). Whatever connection between the robbery and the business was absent in Wang is plainly present in the case at bar.

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* Taylor's second argument is that the district court erred in granting the government's pretrial motion in limine precluding him from presenting evidence that the marijuana at issue was grown in Virginia and thus was not connected to interstate commerce. We review the district court's evidentiary rulings for abuse of discretion. United States v. Moore, 27 F.3d 969, 974 (4th Cir. 1994).

The district court found that, because drug dealing enterprises inherently affect interstate commerce, any argument or evidence tending to show that the drugs in the particular case had not moved across state lines was not relevant. For the reasons expressed in Part II.A, supra, that ruling was correct, and the trial court necessarily did not abuse its discretion in granting the government's motion.

For the foregoing reasons, the judgment of the district court is affirmed.

AFFIRMED

RECORD AND BRIEFS

ORIGINAL

No. 14-6166

Supreme Court, U.S.
FILED
JUL 6 - 2015
OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

DAVID ANTHONY TAYLOR, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the evidence was sufficient to support the jury's conclusion that petitioner's attempted robberies of drug dealers to obtain marijuana and drug proceeds satisfied the commerce element of the Hobbs Act, 18 U.S.C. 1951(a), which prohibits "attempts" to commit a robbery that would "in any way or degree obstruct[], delay[], or affect[] commerce or the movement of any article or commodity in commerce."

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A18) is reported at 754 F.3d 217.

JURISDICTION

The judgment of the court of appeals was entered on June 6, 2014. The petition for a writ of certiorari was filed on September 4, 2014. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Western District of Virginia, petitioner was convicted

on two counts of Hobbs Act robbery, in violation of 18 U.S.C. 1951(a), and one count of using a firearm in furtherance of a crime of violence, in violation of 18 U.S.C. 924(c). The district court sentenced petitioner to 336 months of imprisonment, to be followed by three years of supervised release. The court of appeals affirmed. Pet. App. A1-A18.

1. Petitioner was a member of the "Southwest Goonz," a group of robbers that targeted drug dealers in the Roanoke, Virginia, area. Pet. App. A2. The group, which was led by George Fitzgerald, chose drug dealers as their victims because drug dealers typically stored illegal drugs and cash in their homes and were unlikely to report the crimes to the police. Ibid. Petitioner's Hobbs Act convictions were based on two such robberies.

a. On August 27, 2009, Fitzgerald, petitioner, and two others robbed the residence of Josh Whorley. Pet. App. A3. Fitzgerald had received information -- which he relayed to petitioner and the rest of his crew -- that Whorley sold an exotic, high grade of marijuana. Ibid. Petitioner and the others thus expected to find both drugs and money at Whorley's home. Id. at A3, A13. That expectation was well-founded; Whorley admitted to a detective that he had dealt in marijuana in the past. Gov't C.A. Br. 5. And although Whorley told investigators that he was no longer in the drug trade, a

detective testified that he suspected Whorley of drug dealing because drug dealers are commonly victims of home invasions and Whorley's home had been invaded multiple times before the robbery here. Id. at A14.

The crew entered Whorley's home while Whorley and his girlfriend were present. Pet. App. A3. The robbers kicked in the door and held the victims at gunpoint while they repeatedly demanded to know "where the money and marijuana were located." Ibid.; Gov't C.A. Br. 2-4. Petitioner pistol whipped and groped Whorley's girlfriend and threatened to shoot her genitals, while an accomplice repeatedly struck Whorley. Pet. App. A3; 2013 Trial Tr. (Tr.) 94. The crew, however, was unsuccessful in locating drugs and drug money. They left instead with the girlfriend's jewelry, $40 from her purse, two cell phones, and a marijuana cigarette. Pet. App. A3.

b. On October 21, 2009, petitioner participated in another attempted robbery of drugs and drug proceeds at the home of William Lynch. Pet. App. A4. The group targeted Lynch because a reliable source had informed Fitzgerald that Lynch sold marijuana and that the source had personally robbed Lynch of 20 pounds of marijuana at Lynch's home. Ibid. Lynch later admitted that he was involved in marijuana dealing before the invasion but had concealed that activity from his wife. Gov't C.A. Br. 7.

After the group entered the Lynch home, in which Lynch lived with his wife and their three children, petitioner kept Lynch and two children at gunpoint with his finger on the trigger. Pet. App. A4; see Tr. 357-358, 365, 369. Another assailant chased Lynch's wife into a bedroom, where he tried to remove her pants, assaulted her at gunpoint, and demanded to know where the money and drugs were located. Pet. App. A4; Tr. 373-375. Fitzgerald, in turn, asked Lynch where the marijuana was located. Lynch stated that he did not have the marijuana and that another person "'has the weed.'" Tr. 359; see Pet. App. A4. Petitioner later admitted to a federal agent that they expected to get "pounds of weed" from the home invasion. Tr. 421. The crew, however, ultimately left with only a cell phone. Pet. App. A4.

2. The jury in petitioner's first trial was not able to return a verdict, resulting in a mistrial. Pet. App. A5. Before the retrial commenced, the government filed a motion in limine to preclude petitioner from presenting evidence or argument that robbing a drug dealer of marijuana grown within Virginia would not have violated the interstate commerce element of the Hobbs Act. Ibid. The district court granted the motion. Ibid.

At retrial, the government presented the testimony of an expert in "drug trafficking" and "drug trends" in Roanoke, Tr.

63, who explained that the cocaine and marijuana trades in Roanoke were largely "cash-only business[es]" in which both drugs were sold and repackaged by wholesale- and retail-level entities before being distributed for sale to individual drug users, Tr. 67. See Tr. 64-70.

The district court instructed the jury that a Hobbs Act robbery offense requires, inter alia, proof beyond a reasonable doubt that "interstate commerce or an item moving in interstate commerce was delayed, obstructed, or affected in any way or degree" by the charged offense. Tr. 605. That jurisdictional element will be satisfied, the court continued, if "the defendant reduced the movement of articles and commodities in interstate commerce, in this case illegal drugs and drug proceeds, or attempted to do so by the robberies charged." Tr. 605-606; see Tr. 606-607 (additional jury instructions for the offense of "attempting to commit a Hobbs Act robbery"). The court added that the government need not "prove that the defendant intended to affect interstate commerce; rather, this element may be proven by evidence that a defendant's actions were likely to affect interstate commerce, even though the actual impact on commerce is small." Tr. 606. The jury found petitioner guilty on the Hobbs Act counts and the firearms charge related to the Whorley robbery. Tr. 626-627.

3. On appeal, petitioner did not challenge the district court's jury instructions. See Pet. App. A12. Petitioner argued, as relevant here, that the evidence was insufficient to permit the jury to find the Hobbs Act's jurisdictional element because the government failed to present evidence that the two robberies at issue affected interstate commerce. Pet. C.A. Br. 2, 9, 13-18. The court of appeals affirmed. Pet. App. A1-A18.

The court of appeals rejected petitioner's sufficiency-of-the-evidence argument, Pet. App. A6-A18, based on its conclusion that "the jury could rationally have found that the government met its burden" of proving the jurisdictional element, id. at A13. The court reasoned that the evidence's sufficiency must be analyzed by taking the evidence and "the reasonable inferences to be drawn therefrom" in the light most favorable to the government, id. at A12 (citation omitted), and that, under that standard, the evidence was sufficient to have allowed the jury to find an effect on interstate commerce, id. at A16.

The court of appeals explained that the Hobbs Act requires only a "'minimal' effect on interstate commerce." Pet. App. A7 (citation omitted). That requisite effect, in turn, "do[es] not simply [turn upon] the effect of the individual action in question; it is sufficient that the 'relevant class of acts' has a measurable impact on interstate commerce" in the aggregate. Id. at A7-A8 (citation omitted). The court observed that this Court

had previously determined that the Commerce Clause reaches conduct that "in the aggregate, impacts interstate commerce" in Wickard v. Filburn, 317 U.S. 111 (1942), and, more recently, in Gonzales v. Raich, 545 U.S. 1 (2005), where the Court held that "Congress may regulate [the] intrastate marijuana market because of its aggregate impact on interstate commerce." Pet. App. A8. The court of appeals also cited "the large number of circuits" that had specifically applied that aggregation principle to the jurisdictional element of the Hobbs Act. Id. at A9. The court thus explained that "the precise effect on commerce" need not "be traced in each and every case," ibid., and that the evidence here was sufficient to establish the requisite effect on commerce under "two independent" theories, id. at A16. See id. at A13-A17.

First, the court of appeals concluded that it would have been "reasonable for the jury to conclude that the robberies 'would have the effect of depleting the assets of an entity engaged in interstate commerce.'" Pet. App. A13 (citation omitted); see id. at A13-A15. The court observed that it had previously "found that drug dealing was 'an inherently economic enterprise that affects interstate commerce.'" Id. at A13 (quoting United States v. Williams, 342 F.3d 350, 355 (4th Cir. 2003), cert. denied, 540 U.S. 1169 (2004)). Because "drug dealing in the aggregate necessarily affects interstate commerce"

and because petitioner attempted to rob a drug-dealing operation, the court continued, the government could satisfy the relevant jurisdictional element by "prov[ing] that [petitioner] depleted or attempted to deplete the assets of such an operation." Ibid.

With respect to the Whorley robbery, the court of appeals concluded, the evidence was sufficient to show that "Whorley was a drug dealer"; the crew specifically targeted his home because they were informed that "a drug dealer lived there"; petitioner "expected to find drugs and drug proceeds in the home"; and petitioner stole several items, including a marijuana cigarette, from the home. Pet. App. A13-A14. The court reasoned that the jury could have rationally found either that (a) the robbery resulted in at least a minimal depletion of the operation's assets or (b) petitioner "attempted to steal drugs and drug proceeds" satisfying the Hobbs Act's jurisdictional element. Id. at A14. The court similarly found the evidence sufficient to show that petitioner either "depleted or attempted to deplete" the assets of a drug-dealing entity during the Lynch robbery. Id. at A14-A15.

Second, the court of appeals concluded that the jury could have reasonably found the jurisdictional element based on a "targeting" theory in light of "evidence that [petitioner] intentionally targeted a business engaged in interstate commerce."

Pet. App. A15-A16. The court explained that a defendant who attempts to steal "the proceeds of an enterprise engaged in interstate commerce will not fortuitously escape prosecution" if "his target did not possess those proceeds at the precise time of the robbery." Id. at A16. Petitioner's intent, the court concluded, was thus "probative on the question of whether his actions would have had the 'natural consequence' of affecting [interstate] commerce." Id. at A15 (brackets omitted) (quoting United States v. Powell, 693 F.3d 398, 405 (3d Cir. 2012), cert. denied, 133 S. Ct. 901 (2013)).

ARGUMENT

Petitioner contends (Pet. 7-14) that the evidence against him was insufficient to establish the jurisdictional element of the Hobbs Act and that the court of appeals' decision conflicts with decisions in the Second and Seventh Circuits. That contention lacks merit, and the court of appeals' decision does not conflict with any decision of this Court or any other court of appeals. No further review is warranted.

1. a. The Hobbs Act makes it a federal crime to commit -- or to "attempt[] or conspire[]" to commit -- a robbery that "in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce." 18 U.S.C. 1951(a). The Act defines "commerce" to include not only commerce that crosses a state line but also, inter alia, "all

other commerce over which the United States has jurisdiction." 18 U.S.C. 1951(b)(3). This Court has held that the statute's broad language demonstrates "a purpose to use all the constitutional power Congress has to punish interference with interstate commerce by extortion, robbery or physical violence." Stirone v. United States, 361 U.S. 212, 215 (1960); see Scheidler v. National Org. for Women, Inc., 537 U.S. 393, 408 (2003). That interpretation is consistent with the general principle that the phrase "affects commerce" is presumed to reflect congressional intent to exercise "the fullest jurisdictional breadth constitutionally permissible under the Commerce Clause." NRLB v. Reliance Fuel Oil Corp., 371 U.S. 224, 226 (1963) (per curiam) (emphasis omitted); accord Carr v. United States, 560 U.S. 438, 454 (2010).

This Court in United States v. Lopez, 514 U.S. 549 (1995), reaffirmed that Congress may regulate and protect "the use of the channels of interstate commerce"; "the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities"; and "activities having a substantial relation to interstate commerce, i.e., those activities that substantially affect interstate commerce." Id. at 558-559 (citations omitted). In the third category, the substantiality requirement is not limited to the effects on commerce of a particular indivi-

dual's conduct. Rather, the aggregate effects of the regulated activity may establish that the regulation falls within Congress's commerce power. In other words, "where a general regulatory statute bears a substantial relation to commerce, the de minimis character of individual instances arising under that statute is of no consequence." Id. at 558 (emphasis and citation omitted); accord Gonzales v. Raich, 545 U.S. 1, 17 (2005).

In Raich, the Court confirmed Congress's authority to regulate the intrastate manufacture and possession of marijuana for medical purposes, even though the activity involved only non-commercial, home consumption. The Court relied on decades of precedent "firmly establish[ing]" that Congress has the power to regulate "purely local activities that are part of an economic 'class of activities' that have a substantial effect on interstate commerce." 545 U.S. at 17; see id. at 17-19. The Court explained that marijuana is "a fungible commodity for which there is an established, albeit illegal, interstate market." Id. at 18. The Court accordingly concluded that "locally cultivated" marijuana -- even if produced only for "personal use" -- "may have a substantial impact on the interstate market for this extraordinarily popular substance." Id. at 28. In so holding, the Court found it "'visible to the naked eye' under any commonsense appraisal of the probable consequences" that leaving "such a significant segment of the total market" for

marijuana unregulated would undermine Congress's effort to control the interstate market for the drug. Id. at 28-29 (citation omitted).

b. Petitioner contends (Pet. 7-8) that "generalized evidence that robbery or attempted robbery of a drug dealer" affects interstate commerce is insufficient to show that a particular Hobbs Act offense had the requisite effect on commerce. Instead, petitioner argues (Pet. 8), the Hobbs Act requires "individualized proof * * * that the robbery charged affected interstate commerce" and that the evidence in this case is insufficient to support his conviction because it lacks case-specific proof of such an effect.

The court of appeals held that drug dealing is an "inherently economic enterprise that affects interstate commerce," Pet. App. A13 (citation omitted), such that a Hobbs Act conviction based on the robbery of a marijuana dealer need not rest on evidence of the broader interstate market for marijuana production of which the target enterprise was a part. Id. at A8-A11, A13. Citing Raich, the court explained that "illegal drug enterprises" that "operate out of homes" can have a "significant cumulative effect on interstate commerce." Id. at A11. And because such marijuana "drug dealing in the aggregate necessarily affects interstate commerce," the court concluded, the government could satisfy the Hobbs Act's interstate commerce require-

ment by "prov[ing] that [petitioner] depleted or attempted to deplete the assets of such an operation." Id. at A13.

Raich's analysis establishes that local marijuana-distribution enterprises fall within Congress's regulatory authority under the Commerce Clause, and, therefore, the robbery of such enterprises may be found to affect commerce under the Hobbs Act. Although Raich addressed Congress's Commerce Clause power to prohibit the local cultivation and use of marijuana under the Controlled Substances Act, 21 U.S.C. 801 et seq., the Court's constitutional conclusion bears on the Hobbs Act jurisdictional element because Congress, in enacting the Hobbs Act, intended to exercise the full extent of its Commerce Clause authority. United States v. Culbert, 435 U.S. 371, 373 (1978); see, e.g., United States v. Elias, 285 F.3d 183, 188 (2d Cir.) ("The reach of the Hobbs Act has been held to be coextensive with that of the Commerce Clause of the United States Constitution.") (citing Stirone, 361 U.S. at 215), cert. denied, 537 U.S. 988 (2002).

A further question may be posed whether the jury must be provided with specific evidence in a Hobbs Act prosecution to establish that the robbery of a marijuana dealer occurred in the context of the national marijuana market described in Raich. This case, however, would not be an appropriate vehicle to address that question. Even if evidence beyond the attempted

robbery of a marijuana operation were required to show an effect on commerce under a Raich theory, it would not affect the disposition of this case. That is because the evidence was sufficient for a rational jury to infer that the targeted marijuana enterprises were themselves engaged in interstate commerce.

Both before and after this Court's decision in Lopez, the Hobbs Act has been understood to prohibit the robbery of businesses that trade in out-of-state goods because such interference or attempted interference with interstate commerce has at the very least a slight effect on commerce. The courts of appeals have thus consistently upheld Hobbs Act convictions where a robbery targeted the assets of such a commercial enterprise and where the robbery depleted those assets, even when the depletion was minimal. See, e.g., United States v. Ossai, 485 F.3d 25, 30-31 (1st Cir.) (robbery of doughnut shop), cert. denied, 552 U.S. 919 (2007); United States v. Elias, 285 F.3d 183, 187-189 (2d Cir.) (robbery of grocery store), cert. denied, 537 U.S. 988 (2002); United States v. Robinson, 119 F.3d 1205, 1212-1215 (5th Cir. 1997) (robberies of check-cashing stores), cert. denied, 522 U.S. 1139 (1998); United States v. Smith, 182 F.3d 452, 453, 456-457 (6th Cir. 1999) (robberies of grocery and party stores), cert. denied, 530 U.S. 1206 (2000); United States v. Dobbs, 449 F.3d 904, 911-912 (8th Cir. 2006) (robbery of "'mom and pop' convenience store"), cert. denied, 549 U.S. 1139,

and 549 U.S. 1233 (2007); United States v. Nelson, 137 F.3d 1094, 1102 (9th Cir.) (robbery of jewelry stores), cert. denied, 525 U.S. 901 (1998); United States v. Curtis, 344 F.3d 1057, 1069-1071 (10th Cir. 2003) (robberies of convenience stores and restaurants), cert. denied, 540 U.S. 1157 (2004); United States v. Guerra, 164 F.3d 1358, 1360-1361 (11th Cir. 1999) (robbery of gas station); United States v. Harrington, 108 F.3d 1460, 1468-1469 (D.C. Cir. 1997) (robbery of restaurant). Those holdings recognize that the depletion of assets of a business in interstate commerce or that buys products in interstate commerce will, in the aggregate, affect interstate commerce. That principle applies directly to this case.[1]

The evidence here showed that petitioner sought to rob drugs and drug proceeds from a drug dealer who "sold an exotic and high grade of marijuana," Pet. App. A3, and from another dealer from whom 20 pounds of marijuana had previously been stolen, id. at A4. Indeed, petitioner expected to steal "pounds of weed" in the second robbery. Tr. 421. Such evidence would allow a jury to infer that petitioner attempted to deplete the drugs and drug-derived proceeds of drug dealers who were engaged

---

[1] Petitioner does not question the applicability of the Hobbs Act to cases involving illegal drug trafficking. It is settled that Congress's authority to regulate interstate commerce applies with equal force to both lawful and unlawful commerce. Raich, 545 U.S. at 19 n.29; Perez v. United States, 402 U.S. 146, 155-157 (1971).

in interstate, not purely local, commerce. The jury could reasonably conclude that a dealer selling an "exotic," high-grade of marijuana obtained marijuana that was not local. Likewise, the sheer volume of 20 pounds of marijuana reasonably indicates a drug-dealing enterprise on such a scale that it would obtain at least some of its product in an interstate market.

The Hobbs Act not only prohibits robberies that affect commerce "in any way," it also prohibits the mere "attempt[]" to commit such a robbery. 18 U.S.C. 1951(a). Attempt liability under the Hobbs Act is evaluated under the facts as the defendant believed them to be. See, e.g., United States v. Muratovic, 719 F.3d 809, 814-815 (7th Cir. 2013) (explaining that a defendant's mistaken "belief [that he would rob a dealer of drugs in interstate commerce] provides the requisite interstate effect" for a Hobbs Act conviction). See generally United States v. Williams, 553 U.S. 285, 301 (2008) ("[I]n attempt prosecutions, 'the defendant's conduct should be measured according to the circumstances as he believes them to be, rather than the circumstances as they may have existed in fact.'") (quoting Model Penal Code § 5.01, Comment). Here, given the nature and scale of the operations that petitioner believed he was robbing, the evidence was sufficient to allow the jury to infer that petitioner intended to target dealers engaged in interstate commerce. His convictions are therefore valid under

the line of Hobbs Act authority cited above establishing that the commerce element is satisfied by evidence of an attempted robbery on a business believed to be engaged in interstate commerce. See pp. 14-15, supra; see also Pet. App. A15-A16 (concluding that the evidence was sufficient to show that petitioner "intentionally targeted a business engaged in interstate commerce").

2. Petitioner contends that the decision of the court of appeals conflicts with three decisions of the Second and Seventh Circuits, which petitioner reads as requiring "particularized evidence" that each robbery of a drug dealer has affected interstate commerce. Pet. 10-13 (relying upon United States v. Parkes, 497 F.3d 220 (2d Cir. 2007), cert. denied, 552 U.S. 1220 (2008); United States v. Needham, 604 F.3d 673 (2d Cir.), cert. denied, 131 S. Ct. 355 (2010); and United States v. Peterson, 236 F.3d 848 (7th Cir. 2001)). Although some language in those decisions may be in tension with the court of appeals' analysis in this case, the decisions do not reflect a conflict of authority warranting review.

a. In Parkes, the Second Circuit overruled its prior precedent that had "treated the interstate commerce element of the Hobbs Act as a matter of law for the judge" to decide, 497 F.3d at 227, and held instead that "the Hobbs Act requires the jury to determine * * * whether the conduct affected, or

would have affected, interstate commerce," id. at 230. See id. at 227-230. Parkes further stated that evidence that a robbery targeted drugs or drug proceeds did not per se establish an effect on interstate commerce. Id. at 226-230. The court then held that the evidence in the case was sufficient to establish that "the attempted robbery of * * * marijuana or [drug] proceeds" from "a local, part-time marijuana dealer" in New York "would have affected interstate commerce 'in any way or degree.'" Id. at 231 (quoting 18 U.S.C. 1951(a)). The court explained "a reasonable juror" could have found such an effect based on evidence showing that "marijuana 'is almost exclusively trucked into the United States, predominat[e]ly through Mexico,'" and that "'[v]ery little' marijuana is grown in New York." Ibid. (citation omitted; second set of brackets in original). Because Parkes found the evidence sufficient to support the jury's verdict, the court had no occasion to address whether other evidentiary showings would have been insufficient. In fact, Parkes specifically noted that "[i]t may well be that a rational jury could conclude that the interstate commerce element is satisfied by proof that a robbery targeted drugs or proceeds of a drug business that is purely intrastate," but that it "need not decide" that question to resolve the case. Id. at 231 n.10.

The Second Circuit later held in Needham that a district court erred by instructing the jury (before Parkes was decided) that "all illegal drug activity * * * has an effect on interstate commerce" and that the Act's effect-on-interstate-commerce element "is satisfied" "if you find that the object of the robbery at issue was to obtain illegal drugs or money earned from the sale of illegal drugs." 604 F.3d at 678 (quoting instructions). The court explained that the instructions erroneously "foreclosed the jury's consideration" of whether "the robberies [at issue], which targeted the proceeds of drug trafficking, affected interstate commerce," id. at 675, and, consequently, "the jury never had an opportunity to make this crucial jurisdictional finding," id. at 678.

The Needham court therefore analyzed whether the instructions that had prevented the jury from finding an element of the offense were reversible plain error. 604 F.3d at 678-680, 681-685. The court noted that "the government offered little or no direct evidence supporting the jurisdictional element" other than "the mere fact that the robberies targeted drug trafficking proceeds." Id. at 680. It therefore found that the instructional error was prejudicial (and required reversal) with respect to Hobbs Act convictions based on robberies targeting "marijuana and the proceeds from its sale," id. at 681, because "the erroneous instruction may very well have affected the outcome,"

id. at 682. The court explained that it would be inappropriate "[f]or the [c]ourt, as opposed to a jury, to find that the government's limited evidence" had established an interstate effect. Ibid. That holding reflects the court's view that the evidence presented in Needham was not sufficiently powerful to render non-prejudicial the instructional error that prevented the jury from ever making the requisite finding on an element of the offense. Cf. Neder v. United States, 527 U.S. 1, 11, 17-18 (1999) (holding that an instructional error that "prevent[ed] the jury from making a finding on [an] element" of the offense was harmless in light of the "overwhelming record evidence of guilt" because a "rational jury would have found the defendant guilty absent the error"); Johnson v. United States, 520 U.S. 461, 460-470 (1997) (finding that similar instructional error did not affect substantial rights on plain-error review where the evidence was "overwhelming" and "essentially uncontroverted"). Needham does not address whether the same evidence would have been sufficient if a properly instructed jury had, in fact, made that finding.

Some language in the Needham decision may be viewed, when read in isolation, to support the view that a properly instructed jury (unlike the jury in Needham) would need proof that the particular robbery affected interstate commerce in order to find a Hobbs Act violation. For instance, Needham states that the

government offered "no proof" of an interstate nexus for the robberies at issue, and it noted that the government did not show that "the marijuana sold by the victims had originated out of state" or "was sold to out-of-state customers," that the victims "crossed state lines in conducting their business," or that the "robbery depleted assets that would have purchased goods in interstate commerce." 604 F.3d at 681. But "general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used." Landgraf v. USI Film Prods., 511 U.S. 244, 265 (1994) (quoting Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 399 (1821) (Marshall, C.J.)). And because the "issue [of evidentiary sufficiency] was not presented on the facts of the case," Zenith Radio Corp. v. United States, 437 U.S. 443, 462 (1978), which merely concerned whether the jury's failure to make any finding on the jurisdictional element of the offense was prejudicial, Needham did not resolve a question relevant here.[2]

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[2] The Second Circuit later stated that Needham determined, in the course of deciding "whether the error in the jury instruction affected the defendant's substantial rights," that the trial evidence did not meet the "'modest threshold' of proving a connection to interstate commerce." United States v. Celaj, 649 F.3d 162, 169 (2d Cir. 2011), cert. denied, 132 S. Ct. 1636 (2012). Celaj, however, held that a stipulation that "marijuana is grown outside the state" and "travels in interstate and foreign commerce" was sufficient to show that the robbery of a marijuana dealer has the requisite effect on interstate commerce. Id. at 169-170. Like Parkes and Needham, Celaj does

Petitioner did not challenge on appeal either the jury instructions or the fact of the jury's jurisdictional finding. His argument was that the evidence was insufficient to support the finding that the properly instructed jury actually made. The court of appeals resolved petitioner's appeal by holding that the evidence was sufficient to permit such a finding. Neither Parkes nor Needham addresses such a question.

b. The Seventh Circuit's decision in Peterson similarly provides no basis for review. Peterson reversed a Hobbs Act conviction that had been based on the "jurisdictional theory" that the particular items that the defendants took (or attempted to take) in their robberies of drug dealers had "crossed state lines." 236 F.3d at 853 (quoting the government's opening statement to the jury); see id. at 856. The court concluded that the Hobbs Act "does not envision this type of [jurisdictional] showing" based on the fact that "the items taken -- the money, drugs, and guns -- had crossed state lines at some point"; stated that the government's case "should have focused on the nature of the [drug-dealing] business robbed and how the robbery affected its operation in interstate commerce"; but concluded that the government's belated attempt to focus on that

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not address in a holding what evidence would be insufficient to support a Hobbs Act conviction.

issue on appeal was unavailing because "this theory was not presented to the jury." Id. at 856 (emphasis added).

Peterson recognized that a "de minimis effect" on interstate commerce satisfies the Hobbs Act's jurisdictional element, 236 F.3d at 852, and that the government often can satisfy that standard under a "'depletion of assets' theory," id. at 854. Under a "typical[]" application of that theory, the court explained, the theft of assets from a business that either sells to "out-of-state customers" or buys "inventory manufactured out-of-state" will be deemed to affect commerce because it can "curtail[] the business' potential" role in such interstate transactions. Ibid. Peterson concluded, however, that the government did not establish that the charged robbery of a marijuana dealer affected commerce in that particular way because the government needed (but failed) "to show the jury that [the specific drug dealer's] marijuana source originated from out-of-state or that he sold drugs to out-of-state customers." Id. at 855. That specific showing, the court continued, could not be established with proof that it was "highly unlikely" that the dealer's marijuana was grown in-state because, even with such proof, "it is possible" that it was grown locally. Ibid.

Peterson addressed only the jurisdictional theories presented to it and did not consider whether other alternatives might justify Hobbs Act jurisdiction. Since Peterson, the Sev-

enth Circuit has made clear that the Hobbs Act does not require "the individual criminal act" in question -- i.e., "the robbery of [drug] dealers" -- "be shown to have a measurable impact on commerce." United States v. Marrero, 299 F.3d 653, 655 (7th Cir. 2002), cert. denied, 537 U.S. 1145 (2003). Like the court of appeals in this case, the Seventh Circuit has held that it "is enough if the class of acts has such an impact" and that, even if that class is defined as "narrowly as [the] theft of cash from drug dealers, it is undoubtedly large enough to have some effect on the drug trade" so as to fall within Congress's commerce power to regulate. Ibid.; see United States v. Sutton, 337 F.3d 792, 796 n.2 (7th Cir.) (explaining that robbery can be prosecuted under the Hobbs Act "even if the specific events prosecuted do not, themselves, have a substantial effect on interstate commerce" so long as "the class of transactions or the types of businesses affected * * * have a substantial connection to interstate commerce, such that interference with that class of transactions would have a substantial effect on commerce"), cert. denied, 540 U.S. 1050, and 540 U.S. 1051 (2003); see also United States v. Griffin, 493 F.3d 856, 861 (7th Cir. 2007) (following Sutton).

The Seventh Circuit does not appear to have addressed the type of evidence needed to establish an effect on interstate commerce in cases involving robberies targeting marijuana drug

dealers on such a jurisdictional theory, and its decisions thus do not reflect a division of authority warranting review. Even if Peterson had announced principles in tension with that court's subsequent decisions like Marrero, any resulting uncertainty within the Seventh Circuit would not warrant certiorari. See Wisniewski v. United States, 353 U.S. 901, 902 (1957) (per curiam) ("It is primarily the task of a Court of Appeals to reconcile its internal difficulties.").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 2015

No. 14-6166

Supreme Court, U.S.
FILED
NOV 30 2015
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

DAVID ANTHONY TAYLOR,

Petitioner,

v.

UNITED STATES,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED SEPTEMBER 4, 2014
CERTIORARI GRANTED OCTOBER 1, 2015

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APPENDIX A — RELEVANT DOCKET ENTRIES

RELEVANT DOCKET ENTRIES FROM THE UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF VIRGINIA (ROANOKE), CASE #: 7:12-CR-00043-GEC

Date Filed	#	Docket Text
07/26/2012	22	SUPERSEDING INDICTMENT as to David Anthony Taylor (1) count(s) 1s, 2s, 3s, 4s. (lab) (Entered: 07/27/2012)
		* * *
10/24/2012	55	Jury Notes/Questions as to David Anthony Taylor (ssm)
		* * *
12/04/2012	69	TRANSCRIPT of Proceedings as to David Anthony Taylor for Jury Trial - Day 1 held on 10/22/2012 before Judge Glen E. Conrad. Court Reporter/Transcriber: Judy Webb, Telephone number 540-857-5100 X 5333/judyw@vawd.uscourts.gov
12/04/2012	70	TRANSCRIPT of Proceedings as to David Anthony Taylor for Jury Trial - Day 2 held on 10/23/2012 before Judge Glen E. Conrad. Court Reporter/Transcriber: Judy Webb,

		Telephone number 540-857-5100 X 5333/judyw@vawd.uscourts.gov
12/04/2012	71	TRANSCRIPT of Proceedings as to David Anthony Taylor for Jury Trial - Day 3 held on 10/24/2012 before Judge Glen E. Conrad. Court Reporter/Transcriber: Judy Webb, Telephone number 540-857-5100 X 5333/judyw@vawd.uscourts.gov
		* * *
12/13/2012	82	MOTION in Limine *as to the Hobbs Act* by USA as to David Anthony Taylor. (Bassford, Ronald)
		* * *
12/21/2012	95	First MOTION in Limine *to Exclude Evidence of Cocaine* by David Anthony Taylor. (Weston, Seth)
		* * *
12/21/2012	97	RESPONSE to Motion by David Anthony Taylor re 82 MOTION in Limine *as to the Hobbs Act* (Weston, Seth)
		* * *
01/04/2013	102	ORDER denying 77 Motion in

Limine as to David Anthony Taylor (1); taking under advisement 82 Motion in Limine as to David Anthony Taylor (1); granting in part and denying in part 95 Motion in Limine as to David Anthony Taylor (1). Signed by District Judge Glen E. Conrad on 1/4/2013. (ssm) (Entered: 01/08/2013)

* * *

01/25/2013	118	Jury Notes/Questions as to David Anthony Taylor (ssm)
01/25/2013	119	JURY VERDICT as to David Anthony Taylor (1) Guilty on Count 1s, 3s, 4s, David Anthony Taylor (1) Not Guilty on Count 2s. (ssm)

* * *

01/25/2013	155	Jury Instructions as to David Anthony Taylor (ssm) (Entered: 06/03/2013)

* * *

04/24/2013	135	JUDGMENT as to David Anthony Taylor (1 , Count(s) 1, 2, Superseding Indictment Filed; Count(s) 1s, 3s, 4s, CBOP 336 mos. consisting of 252 mos. as to Counts 1 & 3 to run

concurrently, plus 84 mos. as to Count 4, to run consecutively - SR 3 yrs concurrent as to ea Count, FINE $1000, SA $300; Count(s) 2s, Dismissed in accordance w/ Jury Verdict. Signed by District Judge Glen E. Conrad on 4/24/2013. (ssm) (Entered: 04/25/2013)

04/25/2013 137 NOTICE OF APPEAL - Final Judgment to 4CCA by David Anthony Taylor (Weston, Seth)

* * *

05/29/2013 154 TRANSCRIPT of Proceedings as to David Anthony Taylor for Motion Hearing held on January 3, 2013 before Judge Glen E. Conrad. Court Reporter/Transcriber: Janelle Mundy, Contract Reporter, Telephone number 540/342-2547

* * *

07/12/2013 159 Appeal Transcript filed as to David Anthony Taylor for Jury Trial - Day 1 for dates of 1/23/2013 before Judge Glen E. Conrad, re 137 Notice of Appeal - Final Judgment to 4CCA Court Reporter/Transcriber: Judy Webb, Telephone number 540-857-

5100 X 5333/judyw@vawd.uscourts.gov.

07/12/2013	160	Appeal Transcript filed as to David Anthony Taylor for Jury Trial - Day 2 for dates of **1/24/2013** before Judge Glen E. Conrad, re 137 Notice of Appeal - Final Judgment to 4CCA Court Reporter/Transcriber: Judy Webb, Telephone number 540-857-5100 X 5333/judyw@vawd.uscourts.gov.
07/12/2013	161	Appeal Transcript filed as to David Anthony Taylor for Jury Trial - Day 3 for dates of **1/25/2013** before Judge Glen E. Conrad, re 137 Notice of Appeal - Final Judgment to 4CCA Court Reporter/Transcriber: Judy Webb, Telephone number 540-857-5100 X 5333/judyw@vawd.uscourts.gov.

* * *

06/06/2014	164	USCA 4th Circuit Memorandum Opinion as to David Anthony Taylor re 137 Notice of Appeal - Final Judgment to 4CCA Affirmed decided on 6/6/2014 (lab)
06/06/2014	165	JUDGMENT of USCA as to David

Appendix A

Anthony Taylor re 137 Notice of Appeal - Final Judgment to 4CCA (lab)

* * *

10/01/2015 204 Appeal Remark re 137 Notice of Appeal - Final Judgment to 4CCA: Copy of Letter from Supreme Court to 4CCA re: granting of petitioner's motion to proceed IFP and petition for a writ of certiorari. (sas) (Entered: 10/02/2015)

Appendix A

RELEVANT DOCKET ENTRIES FROM THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT NO. 13-4316

Date Filed	#	Docket Text
05/01/2013	3	DOCKETING NOTICE issued Re: [1] case docketed Initial forms due within 14 days. Originating case number: 7:12-cr-00043-GEC-1. Mailed to: Seth Christopher Weston. [13-4316] (TF)
05/01/2013	4	APPEARANCE OF COUNSEL (Local Rule 46(c)) by R. Andrew Bassford for US. [999099670] [13-4316] Ronald Bassford
05/03/2013	5	MOTION by Appellant David Anthony Taylor to withdraw/relieve/substitute counsel. Attorney or client motion? Attorney .... [999101306] [13-4316] (TF)
		* * *
05/06/2013	10	ORDER filed [999101979] granting Motion to withdraw/relieve/substitute counsel [5] New attorney appointed: Yes Date counsel accepted case: 05/06/2013 Name of new attorney: Dennis Jones. Representation Type: CJA-TD Copies to all parties. Mailed

to: DAVID ANTHONY TAYLOR - #16709-084 CENTRAL VIRGINIA REGIONAL JAIL 13021 JAMES MADISON HWY ORANGE, VA 22960. [13-4316] (LM)

05/15/2013 11 APPEARANCE OF COUNSEL (Local Rule 46(c)) by Dennis E. Jones for David Anthony Taylor. [999108467] [13-4316] Dennis Jones

* * *

09/20/2013 40 BRIEF by Appellant David Anthony Taylor in electronic and paper format. Type of Brief: Opening. Method of Filing Paper Copies: hand delivery. Date Paper Copies Mailed, Dispatched, or Delivered to Court: 09/20/2013. [999198068] [13-4316] Dennis Jones

09/20/2013 41 FULL ELECTRONIC APPENDIX and full paper appendix by Appellant David Anthony Taylor. Method of Filing Paper Copies: hand delivery. Date paper copies mailed dispatched or delivered to court: 09/20/2013. Has district court 90-day restriction expired for all transcripts included in appendix? No. The electronic appendix is initially restricted to case participants only. Case participants

must be logged into CM/ECF to view the appendix prior to public release. Appendices in Immigration and Social Security cases will remain restricted. [999198091] [13-4316] Dennis Jones

* * *

12/04/2013 55 BRIEF by Appellee US in electronic and paper format. Type of Brief: Response. Method of Filing Paper Copies: mail. Date Paper Copies Mailed, Dispatched, or Delivered to Court: 12/05/2013. [999252810] [13-4316] Jean Hudson

* * *

05/15/2014 61 ORAL ARGUMENT heard before the Honorable J. Harvie Wilkinson, III, Stephanie D. Thacker and Clyde H. Hamilton. Attorneys arguing case: Kari Elizabeth Jackson for Appellant David Anthony Taylor, Mr. Dennis Jones for Appellant David Anthony Taylor and Ms. Jean Barrett Hudson, Esq. for Appellee US. Courtroom Deputy: Joseph Coleman. [999356818] [13-4316] (JLC)

06/06/2014 62 PUBLISHED AUTHORED OPINION filed. Originating case number: 7:12-cr-

00043-GEC-1. [999371021]. [13-4316] (TF)

06/06/2014	63	JUDGMENT ORDER filed. Disposition method: 13-4316 opn.p.arg. Decision: Affirmed. Originating case number: 7:12-cr-00043-GEC-1. Entered on Docket Date: 06/06/2014. [999371023] Copies to all parties and the district court/agency. Mailed to: Jackson. [13-4316] (TF)

* * *

06/30/2014	66	Mandated issued. Referencing [63] Judgment Order. [62] Published Authored Opinion. Originating case number: 7:12-cr-00043-GEC-1. [13-4316] (TF)

* * *

09/10/2014	70	SUPREME COURT REMARK—petition for writ of certiorari filed. 09/04/2014. 14-6166. [13-4316] (ABW)

* * *

10/01/2015	75	SUPREME COURT REMARK—petition for writ of certiorari granted. 10/01/2015 [13-4316] (SJC)

APPENDIX B — SUPERCEDING INDICTMENT OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA, ROANOKE DIVISION, JULY 2012 SESSION, FILED JULY 26, 2012

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION
JULY 2012 SESSION

Criminal No. 7:12-cr-00043

In Violation of:
Title 18, U.S.C., §1951(a)
Title 18, U.S.C., §924(c)
Title 18, U.S.C., §2

UNITED STATES OF AMERICA

v.

DAVID ANTHONY TAYLOR

SUPERCEDING INDICTMENT

COUNT ONE

The Grand Jury charges:

1. That on or about October 21, 2009, in the Western Judicial District of Virginia, the defendant, DAVID ANTHONY TAYLOR did knowingly, willfully, and unlawfully obstruct, delay, and affect commerce, and

attempt to obstruct, delay, and affect commerce, and the movement of articles and commodities in such commerce, by robbery, as the terms "commerce" and "robbery" are defined in Title 18, United States Code, Sections 1951(b)(1)and (b)(3), and attempted and conspired to do so, in that the defendant, and others, did knowingly and unlawfully take and obtain, and attempt to take and obtain, marijuana and drug proceeds, as well as a cellular telephone, from the person and property of "WL," against WL' swill, by means of actual and threatened force, violence, and fear of injury, immediate and future, to WL's person and the persons of his family, and did aid and abet in the same.

2. All in violation of Title 18, United States Code, Sections 1951 (a) and 2.

COUNT TWO

The Grand Jury charges:

1. That on or about October 21, 2009, in the Western Judicial District of Virginia, the defendant, DAVID ANTHONY TAYLOR, did knowingly possess and brandish a firearm in furtherance of a crime of violence which may be prosecuted in a court of the United States, as heretofore set forth in Count One of this Indictment.

2. In violation of Title 18, United States Code, Section 924(c).

Appendix B

COUNT THREE

The Grand Jury charges:

1. That on or about August 27, 2009, in the Western Judicial District of Virginia, the defendant, DAVID ANTHONY did knowingly, willfully, and unlawfully obstruct, delay, and affect commerce, and attempt to obstruct, delay, and affect commerce, and the movement of articles and commodities in such commerce, by robbery, as the terms "commerce" and "robbery" are defined in Title 18, United States Code, Sections 1951 (b)(1) and (b)(3), and attempted and conspired to do so, in that the defendant, and others, did knowingly and unlawfully take and obtain, and attempt to take and obtain, marijuana and drug proceeds, from the person and property of "JW," against JW's will, by means of actual and threatened force, violence, and fear of injury, immediate and future, to JW's person and the persons of his family, and did aid and abet in the same.

2. All in violation of Title 18, United States Code, Sections 1951(a) and 2.

COUNT FOUR

The Grand Jury charges:

1. That on or about August 27, 2009, in the Western Judicial District of Virginia, the defendant, DAVID ANTHONY TAYLOR did knowingly possess and brandish a firearm, in furtherance of a crime of violence

which may be prosecuted in a court of the United States, as heretofore set forth in Count Three of this Indictment.

2. In violation of Title 18, United States Code, Section 924(c).

A TRUE BILL this 26th day of July, 2012.

s/
FOREPERSON

s/
TIMOTHY J. HEAPHY
UNITED STATES ATTORNEY

APPENDIX C — MOTION IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA, ROANOKE DIVISION, FILED DECEMBER 13, 2012

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

Criminal No. 7:12-CR-00043

UNITED STATES OF AMERICA

v.

DAVID ANTHONY TAYLOR

MOTION *IN LIMINE* AS TO INTERSTATE COMMERCE

COMES NOW the United States of America, by counsel, and moves that defendant be prohibited from presenting any evidence or argument in support of the proposition that marijuana dealers might be dealing in marijuana grown in Virginia, and that robbery of a drug dealer selling this "in-state" marijuana would not be a violation of the Hobbs Act. This position is contrary to law, and would serve only to confuse the jury. In support of this Motion, the United States says as follows:

In *United States v. Williams*, 342 F.3d 350 (4th Cir. 2003), the Court dealt with the issue of whether the robbery of drug dealers impacted interstate commerce so as to allow prosecution under the Hobbs Act. The Court

found that it did, stating "Drug dealing, to repeat, is an inherently economic enterprise that affects interstate commerce . . . For this reason, the robbery of a drug dealer has been found to be the kind of act which satisfies the "affecting commerce" element of the Hobbs Act, inasmuch as such a robbery depletes the business assets of the drug dealer." (Citation omitted). *Id.* at 355.

The Court also found that it was not necessary that the defendant have intended to effect interstate commerce or that the effect on commerce was certain; it is enough that such an effect was the natural probable consequence of the defendant's actions. *Id.* at 354.

Relying on *Williams*, the Court came to a similar conclusion in *United States v. Mohamadi*, 461 Fed. Appx. 328 (4th Cir. 2012). In this unpublished opinion, the Court found that a prostitution business was, like drug dealing, of an economic nature and interstate in character. As such, the armed robbery of a prostitute depleted her business assets and affected commerce, making the robbery prostitution appropriate under the Hobbs Act. *Id.* at 335. In passing, the Court also repeated the finding of Williams that the robbery of a drug dealer "impacts a trade that plainly is both economic and interstate in character." *Id.* at 335.

Defendant's effort to parse the difference between marijuana grown in-state, and out-of-state finds no support in this case law. The Fourth Circuit has foreclosed this inquiry, taking the position instead that if the robbery is intended to be the robbery of a drug dealer, the Hobbs Act applies. *Williams* at 355.

Appendix C

The correct analysis is to determine whether the intent of the robbery is to rob a drug dealer. If this question of fact is answered in the affirmative, then the robbery, as a matter of law, affects interstate commerce. Defendant should be prohibited from presenting any evidence or argument to the contrary.

Respectfully submitted,

TIMOTHY J. HEAPHY
United States Attorney

Date December 13, 2012

/s/ R. Andrew Bassford
R. Andrew Bassford
Assistant United States Attorney
Virginia State Bar
No. 42584

APPENDIX D — MOTION IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA, ROANOKE DIVISION, FILED DECEMBER 21, 2012

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

CRIMINAL NO. 7:12-cr-00043

UNITED STATES OF AMERICA

v.

DAVID ANTHONY TAYLOR

MOTION *IN LIMINE* TO EXCLUDE ANY REFERENCE TO MATTERS INVOLVING COCAINE

COMES NOW your defendant, David Taylor, by counsel, and moves this Court to prohibit the United States from introducing any evidence or testimony concerning any matters pertaining to cocaine in its case in chief, and states the following in support thereof:

1. The defendant is charged with violating the Hobbs Act by using robbery to interfere with interstate commerce, specifically to obtain "marijuana and drug proceeds."

2. The only rational definition of "drug proceeds" is something of value obtained by the distribution of the

drug, which in this case the United States specifically alleged is marijuana.

3. Evidence of an intent or attempt to commit a robbery to obtain cocaine or drug proceeds from cocaine distribution is evidence of another crime, is not relevant in this trial, and should be excluded under Rule 401 because such evidence does not tend to make a fact more or less probable than it would be without the evidence and the fact is of no consequence in determining this action.

4. Even if such evidence is relevant, it is not admissible under Rule 403 in that its probative value is substantially outweighed by the danger of unfair prejudice, that it would confuse the issues, it will mislead the jury, cause undue delay in this trial, waste time, or result in needlessly presenting cumulative evidence of other uncharged crimes.

5. Such evidence is not admissible under Rule 404, as it does not assist the trier of fact in proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident as any of these pertain to the crime charged.

6. Should the United States intend to introduce such evidence under Rule 404, the Defendant moves this Court to order to United States to notify the Defendant of its intent to introduce such evidence, the specific information sought to be introduced, and the authority under which such evidence is admissible.

WHEREFORE, your defendant, David Taylor, by counsel, moves this Court to prohibit the United States from introducing any evidence or testimony concerning any matters pertaining to cocaine in its case in chief, or any other relief deemed appropriate.

Respectfully submitted,

DAVID ANTHONY TAYLOR

/s/Seth C. Weston, Esq.
Seth C. Weston, Esq.
Counsel for David Anthony Taylor
1031 First Street, SW
Roanoke, Virginia 24016
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APPENDIX E — MOTION TO DISMISS OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA, ROANOKE DIVISION, FILED DECEMBER 21, 2012

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

CRIMINAL NO. 7:12-cr-00043

UNITED STATES OF AMERICA,

v.

DAVID ANTHONY TAYLOR.

MOTION TO DISMISS THE MOTION IN LIMINE AS TO INTERSTATE COMMERCE FILED BY THE UNITED STATES

COMES NOW your defendant, David Taylor, by counsel, and moves this court to dismiss the Motion in Limine as to Interstate Commerce filed by the United States and in support thereof states:

1. Preventing the defendant from presenting evidence on his behalf is odious to the founding principles of our country and a direct violation of the defendant's Constitutional rights under the Fifth and Sixth Amendments.

2. Counsel can find no reported case prohibiting a defendant from producing evidence or argument on his behalf as the United States has motioned the court to do.

3. Moreover, there is no evidence before the court upon which this court could rule upon this motion, and any such ruling would simply be an advisory opinion as to what the court may rule IF the evidence produced during the trial by the United States comports to its motion.

WHEREFORE, your defendant, David Taylor, by counsel, moves this Court to dismiss the Motion in Limine as to Interstate Commerce filed by the United States, or any other relief deemed appropriate.

Respectfully submitted,

DAVID ANTHONY TAYLOR

/s/ Seth C. Weston, Esq.

APPENDIX F — TRANSCRIPT OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA, ROANOKE DIVISION, DATED JANUARY 3, 2013

[1]IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

7:12-cr-00043

UNITED STATES OF AMERICA,

Plaintiff,

vs.

DAVID ANTHONY TAYLOR,

Defendant.

PROCEEDINGS HELD BEFORE THE HONORABLE GLEN E. CONRAD, CHIEF JUDGE

January 3, 2013
1:05 a.m. to 12:05 p.m.
Roanoke, Virginia
Motions

[2](January 3, 2013, 11:05 a.m.)

PROCEEDINGS

Appendix F

THE COURT: Good morning. I'll ask Ms. Mooney to announce the style of the next case.

MS. CLERK: *United States v. David Taylor*, criminal action 7:12-cr-43 for a hearing on motions.

THE COURT: We have cross motions in limine. I wonder who wishes to go first. Mr. Weston.

MR. WESTON: Judge, that's fine. On behalf of the defendant, we've filed three motions on our own. I think the government filed four and replied to three of those. I guess we'll take up the motion to appoint an expert on behalf of my client. I submitted to the Court a proffer, and I made available a copy to the government of what I propose the expert would testify to if she's appointed and allowed to come to trial. It's about four pages long. Does the Court wish to read that over?

THE COURT: I looked at it briefly before we came into the courtroom. I haven't read the entire thing. Do you think it would be helpful to me to read it before I rule?

MR. WESTON: Probably, Your Honor; yes.

[3]THE COURT: All right.

MR. WESTON: I will go over the highlights.

THE COURT: Let's take a moment for me to read it.

MR. WESTON: Yes, sir.

(Court reading document.)

THE COURT: Okay. I had a chance to read over the report.

MR. WESTON: Thank you, sir. In the proffer I asked that it be mark as defendant's one for today's purposes, the proffer. We have had a trial on this so there is some idea what testimony what might lead to in Court. Although, I understand there is a new trial and therefore testimony will be different. But in assuming some of the testimony might come out the same, in terms what the witness testified to and how they identified my client. I suggest to the Court that that is the reason why this Court ought to allow her to be court appointed to assist in this case.

Some of the things in the case law here, particular in this circuit I've looked at, she deals with directly in the proffer. For instance, the effects of stress on memory. There have been studies in the years that have flushed out, so to speak, and made more valuable the opinion of these experts.

[4]Back in 1985 the *United States v. John Downing* this was relatively new and the Court called it new, this type of evidence. It's no longer new. It's been studied and shown to be reliable throughout the last 20-odd years. The effects of stress on memory the witnesses, the Court remembers, testified about somebody breaking into the house. There's guns, there's kids being thrown about. The

other witnesses talk about being hit by the suspects and the demanding of money or drugs and such. Obviously, a very stressful environment for somebody to try to remember what happened.

Additionally, at the time one set of witnesses clearly, in court last time, admitted and stated at the time they identified four people, one of whom was my client, as being the four people that came into the house that time. Although, they then saw a photo line-up about two and a-half years later and said it wasn't one of those four. It was, in fact, my client. These studies show the problem in that type of identification process. The effects of stress on memory have been shown, and she has put in there samples and confidence levels, if you will, of how that effects memory. How that effects people when they are trying to recall what occurred when they are under stress.

At the very last part of her proffer a [5]30 percent of the sample of 1,000 potential jurors in DC were given a test. Thirty percent understood stress decreases memory of detail. Thirty-nine percent erroneously believed stress makes a witness' identification more reliable, the exact opposite of what the studies show.

I suggest to the Court then that shows the Court that this stress effect on memory outside the normal perspective that a juror brings to the table that they wrongly assume stress increases memory when, in fact, it does the opposite. We need an expert to show that to the jury. Otherwise they'll mistakenly believe that 39 percent believe that makes it more reliable.

Additionally, the weapon was present, according to the witnesses. This is a highly distracted factor, according to studies that have been done. Although, as put forth in the proffer, jurors, potential jurors, actually think just the opposite. It makes them more reliable. They did some tests and had tests in there that the Court can read all about percentages and how it affects memory. Cross-racial identification was also a factor in here. If the Court remembers, one of them stated and named a person, if memory serves me right, a person they knew for 20 years as being the black person that committed this and then two and a-half [6]years later picked out my client. There are confidence levels she puts in that proffer that show how this affects memory. Again, two and a-half years after the crime these witnesses picked out a photo spread of my client. There are confidence levels put forth in that studies now showing, none show two and a-half year delay. They didn't go that far out. They did a month or two months or so. But the studies show a marked decrease in the levels of correct suspect identification even a month later.

In this case the evidence was the photographs were shown twice to the people, to the witnesses, which is called a second pass, according to this expert, and that is shown to adversely affect the levels of correctly picking out a suspect.

Judge, I would suggest to the Court given the ruling, the prior ruling in *Drowning*, and has been interpreted later in this Fourth Circuit, *United States v. Harris*, which is 995 F.2d 532, and other subsequent cases. These are the type of factors that the appellate courts look for in deciding whether to allow this type of evidence in.

Now, the Court understands the appellate courts are looking for discretion by the Court. That's their standard. It's not whether you should or should [7]not have allowed this evidence to come in. It's whether this Court uses its discretion in allowing it. It is clearly allowed under the law, and I suggest to the Court, given this proffer and the evidence we expect in court, that this expert ought to be allowed to be court appointed to assist in this case, Judge. Does the Court want the Government to respond?

THE COURT: Do you want to go item by item, Mr. Bassford?

MR. BASSFORD: It might go easier. Your Honor, we looked at the issue a little bit differently in terms of what the standards are for what the Court should appoint an expert or not. Probably the most widely cited case is the *Perrera* 842 F.2d 73, which stands for the proposition in order for the Court to appoint an expert it requires a showing that the expert is necessary to the defense and the defendant would be prejudiced by the non-appointment of the expert.

That's the standard normally cited but probably not the most helpful standard ever given. There is a case that expands a little bit further, *Williams v. Martin*, 618 F.2d 1021. That's a Fourth Circuit case out of 1980. The standard they cite there is when a substantial question exists over an issue requiring expert testimony for its resolution and the [8]defendant's position cannot be fully developed without expert assistance or professional assistance, then the Court should appoint an expert.

So how that translates is that if the government's case depends on an expert to bring forward some sort of technical testimony outside the providence of lay people, then it might be prejudicial to the defendant not to have their own expert to combat what the government is bringing. But that's not what we have here. We have a matter of whether a witness identification is to be believed or not; whether it's credible identification or not. That's a matter within the jury's experience. They can judge the demeanor of the witnesses, judge the circumstances, listen to cross-examination, since the Court recalls this was a matter that was cross-examined on in the previous trial.

And, Judge, based on all of that, so in the government's view, because the government is not bringing forward a witness to talk about something that wouldn't be within the province of the jury, that the defendant then is not prejudiced by the lack of having a witness. Indeed, the defendant is quite able to cross-examine and do the things any defendant could do.

Witness identification is just something that is very much within common experience. For that [9] reason, Your Honor, based on the standards in these cases, the government is not of the view that an expert is necessary for this defense and not of the view that this is someplace where his position cannot be fully developed without professional assistance.

THE COURT: Mr. Bassford, does the government believe that this second trial will proceed pretty much the same as the first in terms of the witnesses offered by the United States?

MR. BASSFORD: Your Honor, I think it's fair to say that the Court will be seeing a lot of the same witnesses; not all, maybe some additional witnesses. But clearly when you have victims it's necessary to bring them forward.

THE COURT: Well, I mean, as I recall last time we only had one other person who supposedly was a member of this illusive associated group. Do you anticipate having more of those people this time?

MR. BASSFORD: Yes, Your Honor.

THE COURT: Do you anticipate those people will identify Mr. Taylor as someone who accompanied them on some of these break-ins?

MR. BASSFORD: Yes, Your Honor.

THE COURT: So it's your belief that the government's case won't turn in terms of identification [10]as much on the victim's testimony as was the case last time?

MR. BASSFORD: Your Honor, there will be additional evidence from at least one other person who is involved in these things. Further, of course, as the Court recalls, there is a matter of confessions and statements and things like that, which alter or corroborate the witness identifications.

THE COURT: Thank you, Mr. Bassford. Mr. Weston, anything else you would say about it?

MR. WESTON: Yes, sir. As to additional witnesses, Judge, my client is not charged with conspiracy. And, frankly, on behalf of my client, I don't want to get into rules of evidence and objections to witnesses testifying, but unless -- the person that the government called to testify could not state they were involved in a particular crimes charged. I would anticipate objecting to that person testifying again. In fact, he testified to getting money, $300, is what he said, that neither sets, as the plaintiff testified, was stollen from them. It's obvious then evidence of another crime. He's not charged with conspiracy. I don't believe -- I don't recall whether they even mentioned the gang that's supposed to be associated with at trial in the case in chief.

[11]THE COURT: Okay. If someone else comes and says, yes, we conducted some of these break-ins; and, yes, David Taylor was someone who accompanied us. It seems to me that comes in.

MR. WESTON: It might, Judge, but the Court would need to have some kind of ruling about what the basis of testimony is going to be and how it is associated with these two particular charges. We are kind of operating in the blind here where the government is asserting they are going to bring in other people to describe other break-ins and allege he's involved in it.

THE COURT: It goes to this very matter of identification; whether or not this was the particular individual who is present on these two occasions. So it seems that's fair game. We didn't have it the last time but

it very well might be the case that that kind of evidence is proper next time around.

MR. WESTON: The Court is right; it may be. We need to find out what it is they are trying to do with these witnesses.

THE COURT: Mr. Bassford's reputation is that's going to be what the government intends to do this time.

MR. WESTON: I understand. I may very well object to the other evidence coming in depending upon [12] what they're going to testify to. But in terms of this, this expert, Your Honor, I will suggest that the government is misreading the standards and in *United States vs. Harris*, which is 995 F.2d 532 from 1993, sets forth that the standard by which the Court appoints experts and, in fact, even talked about, in that case, eyewitness testimony on page three of that. The Court said the narrow circumstances held sufficient to support the introduction of expert testimony have varied but have included such problems as cross-racial identification, identification after a long delay, identification after observation under stress, and psychological phenomena as the feedback factor and unconscious transference.

And then they go and cite other circuits' decisions on allowing and not allowing expert testimony. But all of those things that the appellate court put out as factors are present in this case. This Court uses the rules in determining whether or not to allow expert testimony in as I am suggesting. I would suggest in her proffer she

sets forth the fact that it's scientific and reliable and it's needed and why and those in particular as the Fourth Circuit looked at –

THE COURT: That's one of the problems I have with these experts. She bases her opinions on [13]studies that are made that include a number of variables that are not present in our case. So it's hard to make the transition from those situations, those experiments she has conducted, to the identifications that are said to have occurred here.

MR. WESTON: She confided to the variables set for in her proffer, all of which were in this case and the testimony last time.

THE COURT: Ultimately, the testimony is just as any lay person would understand, that memory fads over a period of time. That would be the conclusion that she would draw from the studies that she's conducted. And that people don't concentrate as well during episodes of stress. That would be the constant. That would be the factor that she would extrapolate from the experiments that she completed to the situation in this case. Those constants are things that everyone understands to be operative factors.

MR. WESTON: That's the problem, Judge. In her proffer she dealt with those when they asked jurors that did these studies. In fact, the studies showed just the opposite. As I mentioned already, there's one study that shows, I think, that 39 percent incorrectly believe it did not affect. The study showed just the opposite. While most

people think it's common knowledge [14]that stress affects people, they don't.

THE COURT: I wouldn't let her render that opinion anyway, because she is being proffered as an identification expert not a jury expert. She wouldn't be competent to make that observation anyway; that the jurors concentrate on the wrong factors or that jurors don't perceive things correctly.

MR. WESTON: I didn't mean the jurors. The studies showed the confidence level of people that he asked and it showed the exact opposite. On page two of the effects of stress on memory, 1,000 potential jurors were asked and that was the study and 30 percent said stress decreases memory and 39 percent erroneously believes stress makes memory more reliable. Those studies that shown the opposite --

THE COURT: Those human-factor observations are just not admissible through an expert. Arguably, she can come in and talk about how identification is impacted by certain factors; stress, the passage of time, racial disparity. That would be appropriate in certain circumstances. I am not sure any of those are present here. But as to the way people perceive these things, we're asked to consider the issues that are offered in a particular case, that is beyond the area of expertise for which she is being offered as an expert. [15]She is an identification expert.

MR. WESTON: Yes, sir; and I think that the studies she is relying upon, well unfortunately, I can't change the

studies. Those are the studies she cites and those are the way they do those studies. They classify those people as potential jurors. I don't have any information on why they use the term potential jurors as opposed to 1,000 random citizens but that's the studies they use, Judge.

THE COURT: I think you're missing what I'm saying. She can come and testify that people don't identify someone involved in an incident as well two years later as they might have two days after the incident occurs. That's what an identification expert will do. But for her to come and say, well, 39 percent of the people believe that the identification would be just as accurate two years after the incident, as it was two days after the incident, that's beyond her area of expertise, at least the area of expertise that we could have her qualify as an expert to render an opinion.

MR. WESTON: I understand. I mentioned it, though, because in the appellant decisions they are talking about confidence levels. I wanted to put it out there. These studies show these confidence levels. That's why I wanted to proffer that to the Court so the [16]Court understands where I'm coming from and ask for this expert to be able to testify.

THE COURT: Thank you. Anything else to be said about it? Well, I will consider the arguments today and consider the pleadings that have been tendered and it's the Court's opinion and belief that we simply don't need an identification expert in this case. I don't usually have such experts. Only in very unusual circumstances, none

of which appear to me to be present here. As I indicated a moment ago, these are considerations that most people understand. It's common sense and really a jury doesn't have to have an expert to tell them about how memory fades, about how people have difficulty sometimes making cross-racial identifications, about how stress impacts someone's ability to understand and remember.

After all, the jury was unable to reach a verdict the first time this case was tried without an expert in identification issues. It seems to me there would be very little prejudice, no prejudice suffered by the defendant, if such an expert is disallowed. I'm going to decline to a point an expert in identification issues at the government's expense and let the matter be tried, at least in that respect, as it was before.

Mr. Weston, what is the next issue?

[17]MR. WESTON: Judge, just for the record, I object to the Court's ruling for the reasons stated on the record.

THE COURT: Objection noted.

MR. WESTON: I just picked up my motion in limine to admit photographs, certain photographs. I have subpoenaed and obtained booking photographs of my client from the Roanoke city sheriff's department that show him at certain times around, I think, 2008 to 2010 generally looking the same facial hair features as he does right now with bald hair. Although he's a little older now than the pictures. I intend on introducing this, Judge, because in

the trial one of the male witnesses testified under oath before a grand jury that the suspect had orange hair. This matters to identification, Judge. Obviously that's a significant factor. Orange hair is not normal. It's rather rare among citizens, I'd suggest, and my client has never had orange hair. These pictures properly show him. I don't think the government's objection to the fact that they depict him as he was. I think their objection was around August or October of 2009, we don't have a picture, or I don't have a picture and I can't help that. He testified what he looked like. I don't think it detracts or hurts the government's case that much [18]that it's more probative -- more prejudicial than probative. It is what it is. It helps the defendant contest one of the eyewitness identification aspects by one of the witnesses in this case.

THE COURT: Mr. Bassford, what is your opinion on this issue?

MR. BASSFORD: Your Honor, it's probably not accurate to say that the photographs come from around those times. The photographs were taken in May and September of '08 and then in June and November of '10. The robberies were in August of '09 and October of '09. So the Court will note there is a certain distance in time from when the robberies took place and when the photographs were taken. As counsel admits, they are designed to explore what facial hair or head hair Mr. Taylor had at the time of the robberies.

I suspect, if the Court were to be asked, it would tell most observers that when Mr. Bassford comes to court he is clean shaven and so it would be on this day.

THE COURT: No longer.

MR. BASSFORD: No longer. But until then, until today, the Court would conclude this would always be so and pictures taken would be probative of now. I would submit to the Court it's much the same thing. [19]That photographs taken from a year prior or a year after are simply probative of nothing. They make no fact in issue. They have no relevance.

THE COURT: Don't they demonstrate that people's appearances change or may not change? A particular individual may undergo very substantial changes or relatively no changes over a period of time. It dovetails what I said a moment ago. People have their own understanding about identification issues and years after an incident occurs, and I think a progression of photographs is helpful in letting folks understand that sometimes it's difficult to make these identifications years after the fact.

MR. BASSFORD: Well, Mr. Taylor in the photo appears to look much the same in each of them.

THE COURT: Then it makes your point that much easier. He's easy to identify. That he has not undergone radical changes over a period of time.

MR. BASSFORD: But to make the point that in 2008 he has no hair on his head and in 2010 he has no hair on his head; therefore, he must not have hair on his head. In 2009 is just -- those things are not logically consistent. One cannot make that assertion; therefore, it could serve no purpose other than to confuse the jury.

Appendix F

THE COURT: It serves several purposes other than that, it seems to me. It seems to me that it does more good than harm. I have difficulty seeing how the jury would be greatly confused by viewing photographs that have been taken in different time periods.

MR. BASSFORD: This time period is distinct and they are being used to show something that is transitory.

THE COURT: They are being used to show that his appearance has changed or not changed over a period of time. It helps the jury understand this fact of nature. People do change. They look differently in 1999 than they did in 1995.

MR. BASSFORD: I think it goes to a narrower issue as far as the hair and beard. There is an argument with the Court that people's features change over time as they age. But to say that someone has or has not a beard or had or had not hair on their head in 2009 when we have clean shaven photographs in 2008 and 2010.

THE COURT: Well, if that's the case then it goes to the point that was made a moment ago and that is that it's difficult to make these identifications at times that are removed from the time of the incident. It seems to me it does more good than harm in helping [21]the jury. So I'm going to let the photographs come in.

MR. WESTON: Judge, the other motion I filed I guess kind of dovetails to the discussion before about other witnesses testifying. I put in a motion in limine to exclude

any matters involving cocaine. The particular indictment in this case says marijuana and drug proceeds. As I said forth in my motion, this case ought to be limited then to robbery of a marijuana trade, for lack of a better way to put it. Once the government is allowed to throw in any other cocaine, for instance, or any other drugs, that's outside of the scope of the indictment. That's evidence of other crimes to which my client has not been charged. He is not charged with conspiracy. He is charged with two discrete acts of trying to rob marijuana in violation of the Hobbs Act.

THE COURT: Well, I'm not so sure of that. I mean, he is charged with attempts to commit robberies of marijuana in violation of the Hobbs Act.

MR. WESTON: Yes, sir; attempts are in there. But again, it's marijuana. If the Court remembers also the government played the 911 tape.

THE COURT: If the government says he engaged in efforts to break-in and attempt to steal cocaine on other occasions and similar circumstances, it [22]seems to me that would be fair game.

MR. WESTON: I would object to it being more prejudicial than probative of whether he committed other crimes. If the government wanted to charge him with also attempting to rob cocaine dealers, it should have included that in the indictment. For the United States to come in and say, oh, we charge him with trying to rob marijuana, but ladies and gentlemen, we have evidence he also did cocaine and heroin. We're not on fair notice of --

THE COURT: You don't think it would be probative of his conduct on these two charged occasions to be able to show that on another occasion he had attempted, in very similar circumstances, to break into the residence of a person who he felt was a drug dealer to rob that individual of cocaine. It seems to me it would be very probative, very helpful and very admissible.

MR. WESTON: Judge, obviously on behalf of my client, I do not agree. If the Court is going to rule that way, it's inflammatory in showing some other series of other crimes that is not associated with these particular charges. If the government has some kind of evidence of proof, that would have to come out in court. But again, from the defense –

[23]THE COURT: Do you think we are talking about testimony from other members of this association of people, this group that's been called the Goonz. Is that how you envision such testimony as being offered?

MR. WESTON: I can only assume that, yes, Your Honor, because that's what we've alleged in the first trial. But again, I don't recall them ever putting somebody on the stand and saying – actually exploring that detail of it. Again, he is not charged with conspiracy, either. He is charged with these two acts and the evidence before the Court and the witnesses were four people, not a bunch of other people and not a bunch of other crimes.

He is not charged with a length of time, for instance, like they normally do in these types of cases, drug dealing

from May 2009 to June of 2010. He is charged with two discrete acts. To allow the government to explore other crimes and other people coming in and say I did these other crimes with him that are not geared towards robbing a marijuana dealer on these two days, are very prejudicial to my client.

THE COURT: Mr. Bassford, what do you have to say on this point.

MR. BASSFORD: I think counsel is engaging in a strained reading of the indictment. It says [24]marijuana and drug proceeds. It doesn't say marijuana and proceeds of selling marijuana. That was kind of the rationale of the Goonz was to take drugs and drug proceeds and frankly anything else they wanted. From the reporting we know in one case it was where's your money, where's your weed, where's your money, where's your weed. But there is really no justification for looking at the government's case to just proceeds of the sale of marijuana, because I think the evidence was certainly from Lewis and from Claytor that they were there to take drugs and drug proceeds, and I think any other witnesses might say the same thing as well. So in the government's view, defendant's reading of the indictment just goes too far.

THE COURT: Anything else to be said about it, Mr. Weston?

MR. WESTON: Just briefly, Judge. I would suggest to the Court it's the only rational reading of it. The government made the indictment and charged my client.

It should be stuck with the four corners of the indictment; said marijuana and drug proceeds. The only rational drug proceeds would be from the illegal sale of marijuana --

THE COURT: Not necessarily.

MR. WESTON: -- cocaine, they should have [25] indicted him for those other charges.

THE COURT: Well, thank you. As I indicated a moment ago, it seems to me that it depends on the context in which the evidence of involvement with cocaine is offered. But in the proposition that I advance, it seems to me that such testimony would be admissible, if someone came in and said that David Taylor accompanied me on an effort to break into the home of a cocaine dealer or steal drugs and drug proceeds. It seems to me that would be admissible and helpful in understanding whether, in a very similar scenario, David Taylor was involved in the two incidents charged in this indictment. So again, I'm not going to rule on this today. I am going to wait and see how the evidence is offered and what context it's presented. In the context that I mentioned, it seems to me it would be admissible under Rule 404b.

Anything else, Mr. Weston?

MR. WESTON: Judge, those are the motions that I filed. The government filed four, and I will tell the Court the government intends to call a witness twice. I have no objection how the government wants to put on its case. It's up to the government how it wishes to proceed. I will wait for the government to put forth the other three.

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[26]THE COURT: Mr. Bassford, what are your motions?

MR. BASSFORD: Your Honor, the first of our motions is in regards to interstate commerce and how the Hobbs Act was implicated. It seems to me that we kind of got going down the wrong road last trial, without perhaps considering the *Williams* case. And indeed, the other case that follows from it, the *Mohomitty* case. Both of which seems to stand for the proposition that if you are robbing someone with the intent of steal from a drug dealer then you are, in fact, affecting interstate commerce. The distinction that was brought about in state marijuana versus interstate marijuana is really artifical. It doesn't exist in the law.

THE COURT: I'm not sure I remember Mr. Weston making a big point about that. I'm not sure that's where the jury decided the case, at least some members of the jury, against the government. It seems to me that the area of confusion lay elsewhere. I know I granted Mr. Weston the opportunity to contact jurors.

Did either one of you contact the jurors and find out exactly what the point of contention among the group might have been?

MR. WESTON: I had contacted a few of the jurors.

[27]THE COURT: Were you able to get a straight answer on that? What did they hang up on? What issue couldn't they agree about?

MR. WESTON: I am a little reluctant to advise the Court in front of the government. They may well be able to use that strategy to better enhance their case at the expense of my client.

THE COURT: Did the instruction on the interstate commerce vis-a-vis drugs provide any basis for confusion?

MR. WESTON: Judge, may I approach?

THE COURT: Sure.

MR. WESTON: If the Court orders me to answer I will. Judge, but again, they have investigators. They can go out and talk to jurors also. I really believe this is getting in an area of trial strategy, and I'm reluctant to advise the Court. Perhaps if we can do it ex parte, I would be more than happy to advise.

THE COURT: I think you have said enough for me to understand that Mr. Bassford's motion about the marijuana is probably well taken. I think that I'm going to have to prohibit you from making that argument on exactly those terms; on the terms set forth in Mr. Bassford's motion.

[28] Now, I think there are other things that you could argue about the marijuana; whether these people were actually drug dealers, whether there was any attempt on Mr. Taylor's part to steal drugs. There are other arguments that can be made that implicate the marijuana. But at least in terms of Mr. Bassford's motion, it seems to me that on its four corners it has to be granted.

MR. WESTON: Judge, may I have the Court explain the ruling so I'll be sure for my trial purposes.

THE COURT: Well, I'm not going to explain my effort to engage in speculation as to what might have impacted the jury. But in terms of what Mr. Bassford stated in his motion -- let me see if I can find that.

MR. WESTON: I don't object if the Court's ruling --

THE COURT: The Court's ruling is that the defendant may not present any evidence or argument that the robbery or attempted robbery of drug dealers who deal only in Virginia-grown marijuana would not violate the Hobbs Act.

MR. WESTON: I understand the Court's ruling. I guess depending upon how the evidence comes out in the trial, Judge, I may have to have an ex parte [29]ruling after the evidence is in, perhaps depending upon the evidence. If I understand the Court's ruling, I don't object to the government's position that these case laws stand for the fact that drug dealing in interstate commerce but there maybe other avenues of defense, Your Honor.

THE COURT: It seems to me, as I recall the evidence from the first case, there are certain other avenues that might be pursued about the drugs and about the attempt to steal drugs that would not be covered by this ruling. Just so everyone understands to the extent those avenues exist, as of today, the Court considers those to be fair game for the defendant. Okay.

What is the next matter, Mr. Bassford.

MR. BASSFORD: Your Honor, I have one more housekeeping matter, and then I will turn it over to Ms. DeGraw for the last two motions. I wish some clarity from the Court so we don't mess anything up later on.

Mr. Taylor testified the last time and in the government's view, were he to testify again, the government would be free and able to ask him questions about his previous testimony under oath. Does the Court see any problem with that proposition?

THE COURT: Well, it depends on the question and depends on which excerpt from his previous testimony [30]you would question him on. I don't think that you can ask him questions about matters that he testified to the first time that were not mentioned the second time. You can't impeach him on something that's not said during the trial in front of a particular jury that's trying the case.

MR. BASSFORD: For example, Your Honor, say he put on a theory of innocence in the first trial, and then he comes on the stand and doesn't mention the same theory of innocence but gives an alternate theory of innocence.

THE COURT: Just off the top of my head, I would say, no, that's not appropriate. The jury is charged to consider his testimony at this trial. He may not even testify at this trial; who knows. But if he testifies and just goes and speaks in terms of his own character and his own history, then it seems to me that cross-examination would be limited to those matters, and you can impeach

him with things that he said at the time of the first trial, as to those issues, as to those propositions.

MR. BASSFORD: Where the government is concerned is -- so he presents some theory of innocence at the first trial, he should not be free to abandon that and invent something else in the second trial and [31]yet not be held to account for the change in position.

THE COURT: You have to give me a more concrete example. He said he didn't do it.

MR. BASSFORD: Well, he said more things than that, Your Honor. He said, for instance, he was incapable of doing it, because he has arthritis and he can't hold a gun. Now, what if he doesn't say it on the stand the second time and says something else that is similar.

THE COURT: Depends on what he says. If it has to do with holding a gun and using a firearm, I think that perhaps you could. But if he doesn't mention his capacity to engage in a crime that involves a firearm, it seems to me that you would be excluded from asking him questions about things he may have said at the first trial.

MR. BASSFORD: I bring this up so the Court can think on it, because in the government's view were Mr. Taylor to testify again, and were he to differ in factual matters, not necessarily matters of character, you know, perhaps, this would be a prior inconsistent statement.

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THE COURT: Whether it qualifies as a prior inconsistent statement, you could ask him those questions. That's not what I understood you to be [32]suggesting.

MR. BASSFORD: If he says (a) here and (b) here, then there would be prior inconsistent statement, if it's within that narrow area. But if he propounds a theory of innocence of one sort in the first trial, abandons that and comes with a totally different theory of innocence, where the two may, in fact, be inconsistent, the government would like to be able to address this.

THE COURT: His defense was I was not there. I did not do it. When he went on, though, he said I couldn't have done those things that I have been said to have done in any event.

MR. BASSFORD: Well, it's the part I couldn't have done those things is most intriguing to the government. If the things that were preventing him from doing it the first time don't come up the second time, or we have new things that prevented him or whatnot, it seems he would be fair game.

THE COURT: If it deals with his capacity to hold a firearm, I think I am going to have to hold you to a pretty strict limits on that issue.

MR. BASSFORD: Well, that or perhaps other things. The government's goal is just to make it so he doesn't have a free pass to invent something else for [33]this trial.

THE COURT: Well, apparently it's not something that we are not going to be able to rule on today.

MR. BASSFORD: As long as the Court is thinking about it, I've done what I need to do, Your Honor.

THE COURT: Fair enough.

MR. WESTON: I think the Court is correct. We can't rule on evidence not before the Court yet. We'll probably take this up at trial should my client decide to testify.

THE COURT: Fair enough. What else.

MS. DEGRAW: Your Honor, I will be addressing the motions as to the witnesses, Ms. Muse as well as Mr. Beale and Officer Preston together. It's much the same argument by the government for both of these motions. There are actually three bases why these witnesses should be allowed to testify. The first and probably strongest argument is as evidence of specific contradiction. As outlined in the motion, there were several items that these witnesses would be able to address and that testimony we anticipate may come through the defendant, himself, or through any other witness that the defense may put forward. Specifically [34]addressed in the motion, the defendant's capacity and ability to carry a firearm and whether or not he would be able to do that, as well as his capacity for violence. And, the fact that he only, in his prior malicious wounding conviction, acted to protect his sister. These items would not be collateral evidence, extrinsic evidence including other witnesses, could be used to testify to. These go to the heart of the matter of trial. Specifically whether the defendant would be able to carry

out these actions and use a weapon, such as a firearm. The prior malicious wounding involved an actual stabbing and that injured somebody's spine using a weapon. That is a much more, I guess, forceful act than actually being able to operate a firearm.

THE COURT: You are speaking of only evidence in rebuttal?

MS. DEGRAW: Right now I'm speaking of rebuttal, specifically anticipating the defendant or any of his witnesses may testify to. Also the next item I would be addressing is the 404b. This specifically asks for rebuttal, as we anticipate the defendant may testify to some of these items, again, based on reviewing the prior transcripts.

THE COURT: I think I've already ruled the earlier incident of malicious wounding is not coming in [35] as direct evidence. So that's out. Now, if he would happen to get up on the stand and testify this time that I could use a firearm, then perhaps. It's likely that would come in as rebuttal evidence.

MS. DEGRAW: Also, Your Honor, specifically as to that act, he testified that his motivation for that was in defense of his sister and tried to make that sound as if it was some type of helpful act. These witnesses would actually be able to offer testimony that that was not the purpose.

THE COURT: Possibly. Depends exactly on what he says. That's something we're not going to rule on today, either.

MS. DEGRAW: As to the other witness, Ms. Muse would be offered also based on the investigation and what the government determined she would be able to offer testimony about the defendant's ability and the fact he did carry a firearm regularly. So she observed personally in dealings with him. She also would be able to testify to, based on some of the dealings with the defendant, if he testifies, as the government anticipates he would, his non-violent character and other things that matter that he put forth such as being a good father and things like that. There's specific evidence –

[36]THE COURT: It depends on exactly what he says. As to the former, probably that comes in. His habit for carrying a firearm, if he testifies that he couldn't carry a firearm. As to the latter, those subjective issues, it's not likely that that comes in; good father, good Christian, good person. She probably can't impeach him on that testimony other than to say he is not. She is not going to be allowed to say he beat me up.

MS. DEGRAW: Even if the defendant testifies that he's a non-violent person, Your Honor, and opens that character door?

THE COURT: Probably not. It depends on what exactly he might say.

MS. DEGRAW: As for her and 404b purposes being offered, as the motion addressed, there was one specific act between the defendant and Ms. Muse that would go towards identity and some of these things that are being placed in issue and are being called into question. Also

it would go towards motive and common scheme of plan; specifically, this witness would be able to testify that the defendant on one occasion actually robbed her and in similar to one of two robberies that are actually charged here ripped rings off of her/a female's finger and stole those items, the jewelry, the [37]rings, forcefully off her finger as well as electronics including a cell phone and some other items which are similar to the robbery involving LaTocha Gram where rings were forcibly ripped off her fingers and that jewelry and other similar small items were stolen; an I Pod, a phone. Things like that. That would go towards the identity. These were within several months of each other, these events, and they would go not only towards the defendant's identity but also towards the motive and purpose for robbing these items, as well as showing a common scheme of plan that was carried out by the defendant to commit similar acts of robbery.

THE COURT: Well, again, I am going to have to wait and see exactly how the evidence unfolds in the second trial. I question whether or not that would be overly prejudicial. The question whether or not it's not a rule 403 concern, but we will have to wait and see. I have my doubts about Ms. Muse being able to testify for any purpose other than rebuttal.

MS. DEGRAW: I would ask, Your Honor, as you do consider that throughout the trial, that for rule 403 purposes, that relevant evidence such as that would be admissible unless that prejudicial, or potential prejudicial, substantially outweighs the probative value and is even intended to be a very inclusive standard.

[38]Finally, the third basis for this evidence would be in anticipation of whether the defendant would testify, to again, that his testimony did open that door for character evidence. He placed character at issue by saying things such as he is not a violent person. He does not use a gun. He does not carry a gun. He is a good father, a good Christian. That information that he testified to, in the previous trial, that all is the definition of character evidence. He put forth this good positive character evidence and the government was not allowed to come back and rebut that type of character evidence ir any effective way. Obviously, cross-examination is somewhat limited.

THE COURT: I don't remember the government attempting to do so.

MS. DEGRAW: Your Honor, the government -- well, cross-examination is not going to be the most effective way to do that. The defendant just testified to I am a good father. I am a good person.

THE COURT: I don't remember disallowing a single witness that the government offered.

MS. DEGRAW: That would be the purpose of these witnesses to address that anticipated –

THE COURT: As I say, it's possible an probably likely that Ms. Muse could testify as a [39]rebuttal witness at a second trial. The scope of that testimony remains unclear. I doubt if she's going to come in and testify he beat me up every Saturday night. That's not going to come in or

be allowed. If she comes in and says -- if she is allowed to otherwise testify, she might also be asked: Do you think he was a good father? And she could say, no. But she is not going to be able to elaborate or give specific instances that Mr. Taylor was not a good father, spouse or good companion. It goes beyond the pale and overly prejudices his case.

MS. DEGRAW: Is Your Honor going to reserve that ruling based on what testimony --

THE COURT: Yeah, I'm going to reserve ruling on whether or not she is going to be allowed to testify as a rebuttal witness until the appropriate time.

MS. DEGRAW: And based on the testimony that comes forth from the defendant I've had time would --

THE COURT: Right. If he gets up and says I have a son. I used to take him fishing every Saturday, and we'd do a lot of things together and our relationship was perfect. If he says something like that, perhaps, she can come and rebut those ascertains. But if he just says I was a good dad, and I did my best, I would try to be a good Christian and treat everyone [40]fairly. There is just not much to say. That's going to be for the jury's determination whether or not that has any weight or bearing on the outcome.

MS. DEGRAW: Finally specifically, Your Honor, as to the defendant makes ascertains that he is a nonviolent person, a peace-loving person, would never harm anyone. Would the government still be limited?

THE COURT: That's a grey area. It depends on exactly what is said.

MS. DEGRAW: Thank you, Your Honor.

THE COURT: Mr. Weston, what comments do you have in response to all this.

MR. WESTON: Not much, Judge. I was going to ask the Court not to rule on it today our dismiss it, but because there is no evidence for the Court to rule.

THE COURT: We are going to allow the government to have Ms. Muse on its witness list and available to testify on rebuttal, if the government is so inclined.

MR. WESTON: I would ask the Court to limit it to the testimony at hand, and you can't rule on it until we find out what evidence is at hand.

THE COURT: Fair enough.

MS. DEGRAW: Just to clarify, I mean, Ms. Muse, is the government able to have Mr. Beale as well [41]as Officer Preston available as rebuttal witnesses as well?

THE COURT: I've forgotten what you believe they would say in rebuttal.

MS. DEGRAW: They certainly would be able to for specific contradiction purposes the defendant's capacity to carry and use a weapon.

THE COURT: Yes. If he testifies that he cannot actually carry a firearm and these witnesses, yes, his testimony can be rebutted thoroughly on that issue.

MS. DEGRAW: Also, Your Honor, as to the purpose of that incident and the malicious wounding when the defendant testified that that was for the purposes of protecting his sister. They would also be able to draw for a specific contradiction to rebut, if that was the purpose based on --

THE COURT: If he says I don't have any prior record except for this malicious wounding and that can all be explained by the fact that I was trying to protect my sister. Then I think, in all likelihood, you would be able to rebut that testimony.

MS. DEGRAW: Thank you, Your Honor.

MR. WESTON: Judge, I understand the victim of the crime is going to testify as to the facts of the [42] crime. Roanoke City Police, Officer Preston, however, investigated the cause and unless he actually saw him carry a weapon and other things --

THE COURT: I think Mr. Beale would be the primary witness to rebut any testimony that I did this in defense of my sister.

MR. WESTON: I want to point out that the officer, investigating officer, would just be reporting on hearsay. I am not sure how he would bring anything to the table

other than what Mr. Beale told him about the crime. The government proffered him as a potential witness. I just want to put out there that I'm not sure an investigating officer is a proper witness in this case.

THE COURT: Unless he is able to testify as to something that Mr. Taylor said about that incident.

MR. WESTON: I understand.

THE COURT: Anything else?

MS. DEGRAW: No, Your Honor.

THE COURT: Mr. Weston, anything on your part?

MR. WESTON: No, Your Honor.

THE COURT: All right. Then we'll try to set these rulings to writing. I won't go into any detail on legal briefs. I will just state what the [43]Court's ruling has been on each of these matters and have that order entered in the next day or so. We'll see all of you on the day and time set for trial.

Ask the marshal to declare Court in recess pending return of court.

(Proceedings concluded at 12:05 p.m.)

* * * * *

APPENDIX G — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA, ROANOKE DIVISION, FILED JANUARY 4, 2013

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

Criminal Action No. 7:12-CR-00043

UNITED STATES OF AMERICA

v.

DAVID ANTHONY TAYLOR

ORDER

Before: Hon. Glen E. Conrad
Chief United States District Judge

The parties filed cross-motions regarding evidence to be presented at the second trial in this case. Based upon the reasons stated in open court, it is hereby **ORDERED** as follows:

1. The defendant's motion to have an expert witness appointed regarding identification issues (Docket No. 62) is **DENIED**;

2. The defendant's motion *in limine* regarding evidence of cocaine (Docket No. 95) is **TAKEN UNDER ADVISEMENT**;

3. The government's motion *in limine* as to certain photographs of the defendant (Docket No. 77) is **DENIED**;

4. The government's motion *in limine* as to evidence or argument concerning the impact of Virginia-grown marijuana on interstate commerce is **GRANTED**; and

5. The government's notices of intent to introduce evidence pursuant to Federal Rule of Evidence 404(b) (Docket Nos. 80 and 81) are **TAKEN UNDER ADVISEMENT.**

ENTER: This 4th day of January, 2013.

/s/
Chief United States District Judge

APPENDIX H — EXCERPT FROM JURY INSTRUCTIONS

It is now time for me to instruct you as to the substantive law that will govern your consideration of this case. The defendant is charged with several offenses; each offense is charged in a separate count of the indictment. The number of the offenses charged is not evidence of guilt, and this should not influence your decision in any way. You must separately consider the evidence that relates to each offense, and you must return a separate verdict for each offense. For each offense charged, you must decide whether to the government has proved beyond a reasonable doubt that the defendant is guilty of that particular offense.

I tell you that merely because you find the defendant guilty of one of the offenses stated in one count of the indictment, that does not, in and of itself, establish his guilt under any of the other offenses charged in the indictment.

Counts One and Three of the indictment charge the defendant with obstructing, delaying, or affecting interstate commerce by means of robbery, in violation of the Hobbs Act, 18 U.S.C. § 1951.

It is charged in Count One of the Indictment that on or about October 21, 2009, in the Western Judicial District of Virginia, the defendant, DAVID ANTHONY TAYLOR, did knowingly, willfully, and unlawfully obstruct, delay, and affect commerce, and attempt to obstruct, delay, and affect commerce, and the movement of articles and commodities in such commerce, by robbery, as the terms

"commerce" and "robbery" are defined in Title 18, United States Code, Sections 1951(b)(1) and (b)(3), and attempted and conspired to do so, in that the defendant, and others, did knowingly and unlawfully take and obtain, and attempt to take and obtain, marijuana and drug proceeds, as well as a cellular telephone, from the person and property of "WL," against WL's will, by means of actual and threatened force, violence, and fear of injury, immediate and future, to WL's person and the persons of his family, and did aid and abet in the same, in violation of Title 18, United States Code, Sections 1951(a) and 2.

It is charged in Count Three of the indictment that on or about August 27, 2009, in the Western Judicial District of Virginia, the defendant, DAVID ANTHONY TAYLOR, did knowingly, willfully, and unlawfully obstruct, delay, and affect commerce, and attempt to obstruct, delay, and affect commerce, and the movement of articles and commodities in such commerce, by robbery, as the terms "commerce" and "robbery" are defined in Title 18, United States Code, Sections 1951(b)(1) and (b)(3), and attempted and conspired to do so, in that the defendant, and others, did knowingly and unlawfully take and obtain, and attempt to take and obtain, marijuana and drug proceeds, from the person of "JW," against JW's will, by means of actual and threatened force, violence, and fear of injury, immediate and future, to JW's person and the persons of his family, and did aid and abet in the same, in violation of Title 18, United States Code, Sections 1951(a) and 2.

The defendant has been charged with violations of the Hobbs Act, that is, with obtaining certain property

through robbery. To find the defendant guilty of these charges, the government must prove three elements beyond a reasonable doubt:

FIRST: that the defendant knowingly obtained or took the personal property of another, or from the presence of another;

SECOND: that the defendant took this property against the victim's will, by actual or threatened force, violence, or fear of injury, whether immediately or in the future; and

THIRD: that as a result of the defendant's actions, interstate commerce, or an item moving in interstate commerce, was delayed, obstructed, or affected in any way or degree.

In considering the third element of the offenses charged in Counts One and Three, whether there has been an obstruction, delay, or effect on interstate commerce, I tell you that the government has met its burden of proof if you find and believe from the evidence, beyond a reasonable doubt, that the defendant reduced the movement of articles and commodities in interstate commerce, in this case, illegal drugs and drug proceeds, or attempted to do so, by the robberies charged in Counts One and Three. It is not necessary for the government to prove that the defendant intended to affect interstate commerce. Rather, this element may be proven by evidence that a defendant's

actions were likely to affect interstate commerce, even though the actual impact on commerce is small.

If you unanimously find that the government has proved beyond a reasonable doubt each of these three elements as to the robbery charged in Count One, then you must find the defendant guilty of that crime.

Likewise, if you unanimously find that the government has proved beyond a reasonable doubt each of these three elements as to the robbery charged in Count Three, then you must find the defendant guilty of that crime.

You must consider the offenses charged in Counts One and Three of the indictment separately, and decide whether the government has proved beyond a reasonable doubt the elements of each offense, only one of the offenses, or neither of the offenses.

The defendant has also been charged with attempting to commit a crime, that is, with attempting to commit robbery.

To find the defendant guilty of this charge, the government must prove two elements beyond a reasonable doubt:

FIRST: that the defendant had "culpable intent to commit the crime charged";

SECOND: that the defendant took "a substantial step towards the completion of the crime that strongly corroborates that intent."

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In determining this second element whether the defendant took the required substantial step you are instructed that a substantial step is more than mere preparation but less than completion of the crime.

Finally, while the evidence must show more than "mere preparation" to support conviction, factual impossibility is not a defense to an attempted robbery. In other words, if the evidence proves criminal intent and a substantial step towards completion of the crime, you may find the defendant guilty even if it would have been impossible for him to have, in fact, completed the crime.

The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his or her will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his or her person or property, or property in his or her custody or possession, or the person or property of a relative or member of his or her family or of anyone in his or her company at the time of the taking or obtaining.

The term "commerce" means any commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

Appendix H

The term "property," as used in these instructions, means money or anything of value, and may include items which cannot be legally possessed.

APPENDIX I — SPECIAL VERDICT FORM IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA, ROANOKE DIVISION, FILED JANUARY 25, 2013

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

Criminal Action No. 7:12-CR-00043

UNITED STATES OF AMERICA

v.

DAVID ANTHONY TAYLOR

SPECIAL VERDICT FORM

Before: Hon. Glen E. Conrad
Chief United States District Judge

COUNT ONE

1. Do you the jury find the defendant, DAVID ANTHONY TAYLOR, guilty beyond a reasonable doubt of knowingly and unlawfully taking and obtaining, or attempting to take or obtain, by robbery, items having an effect on interstate commerce by means of actual and threatened force, violence, and fear of injury on or about October 21, 2009?

☒	☐
YES	NO

Appendix I

COUNT TWO

2. Do you the jury find the defendant, DAVID ANTHONY TAYLOR, guilty beyond a reasonable doubt of knowingly possessing a firearm in furtherance of a robbery that occurred on or about October 21, 2009?

☐	☒
YES	NO

COUNT THREE

3. Do you the jury find the defendant, DAVID ANTHONY TAYLOR, guilty beyond a reasonable doubt of knowingly and unlawfully taking and obtaining, or attempting to take or obtain, by robbery, items having an affect on interstate commerce by means of actual and threatened force, violence, and fear of injury on or about August 27, 2009?

☒	☐
YES	NO

COUNT FOUR

4. Do you the jury find the defendant, DAVID ANTHONY TAYLOR, guilty beyond a reasonable doubt of knowingly possessing a firearm in furtherance of a robbery that occurred on or about August 27, 2009?

☒	☐
YES	NO

/s/_____
Foreperson's Signature

/s/_____
Foreperson's Printed Name

January 25, 2013
Date

APPENDIX J — NOTICE OF APPEAL OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA, FILED APRIL 25, 2013

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA

CRIMINAL NO. 7:12-CR-00043

UNITED STATES OF AMERICA

v.

DAVID ANTHONY TAYLOR

NOTICE OF APPEAL

Notice is hereby given that David Anthony Taylor, Defendant in the above named case, hereby appeals to the United States Court of Appeals for the Fourth Circuit from the final judgment entered in this action on April 23, 2013.

Date: April 25, 2013

/s/ Seth C. Weston, Esq.
Seth C. Weston
Attorney for David Anthony Taylor
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APPENDIX K — PUBLISHED OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT, FILED JUNE 6, 2014

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 13-4316

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

DAVID ANTHONY TAYLOR,

Defendant-Appellant.

Appeal from the United States District Court for the Western District of Virginia, at Roanoke. Glen E. Conrad, Chief District Judge. (7:12-cr-00043-GEC-1)

Argued: May 15, 2014 Decided: June 6, 2014

Before WILKINSON and THACKER, Circuit Judges, and HAMILTON, Senior Circuit Judge.

Affirmed by published opinion. Judge Wilkinson wrote the opinion, in which Judge Thacker and Senior Judge Hamilton joined.

Appendix K

WILKINSON, Circuit Judge:

David Anthony Taylor appeals his convictions for two counts of Hobbs Act robbery in violation of 18 U.S.C. § 1951(a) and one count of using a firearm in furtherance of a crime of violence in violation of 18 U.S.C. § 924(c). Taylor contends both that the government failed to introduce sufficient evidence to establish that his robberies affected interstate commerce and that the district court erred in prohibiting him from showing that the particular drugs he was seeking to steal did not affect interstate commerce. Pursuant to Supreme Court precedent supporting the broad ability of Congress to punish the disruption of interstate commerce and our own conforming decisions in *United States v. Tillery*, 702 F.3d 170 (4th Cir. 2012), and *United States v. Williams*, 342 F.3d 350 (4th Cir. 2003), we affirm his convictions.

I.

A.

Taylor was a member of the "Southwest Goonz," a group of robbers led by George Fitzgerald and based in Roanoke, Virginia. The Goonz focused on robbing drug dealers because they typically have drug proceeds in their homes and, because of the illegal nature of their activities, they are reluctant to report crime to the authorities. Taylor persuaded Fitzgerald to take him on several planned home invasions in order to steal drugs and drug proceeds, such as money and jewelry.

One of these break-ins was planned for the residence of Josh Whorley, where his girlfriend Latasha Graham and her two children also lived. Fitzgerald chose Whorley's home because he had learned that Whorley sold an exotic and high grade of marijuana, a belief that he communicated to Taylor and two other group members. The robbers expected to find both drugs and money there.

Their expectations were not unreasonable, because Whorley had both used and sold drugs in the past. Graham herself was a regular marijuana user. Additionally, Whorley's house had been broken into twice prior to the August 27, 2009 robbery, and a housemate had been held at gunpoint in the driveway.

Taylor and his associates robbed Whorley's house on the night of August 27. The four robbers kicked in the front door and held guns to Whorley and Graham while searching the house. During the robbery, Taylor hit Graham in the head with his pistol, groped her, and clawed the rings off her fingers. Whorley was also repeatedly struck by one of the robbers. The robbers demanded that Graham tell them where the money and marijuana were located. All in all, the robbers made off with Graham's jewelry, $40 from her purse, two cell phones, and a marijuana cigarette.

Another break-in was planned for the home of William Lynch, who lived together with his wife, Whitney Lynch, and their three children. Fitzgerald chose Lynch's home because he had been told by a previously reliable source that Lynch sold marijuana. The source further informed

Fitzgerald that on a prior occasion he had personally robbed Lynch, also known as "W.T.," of twenty pounds of marijuana. Lynch surrounded himself with people who used and possessed drugs. Taylor and Fitzgerald both expected to recover marijuana and drug proceeds during the home invasion.

The Goonz robbed Lynch's residence on October 21, 2009. Taylor initiated the robbery by knocking on the front door. After he entered the home, Fitzgerald and another group member followed. Once inside, Taylor held Lynch and his six-year old son at gunpoint in the living room, while another robber forced Lynch's nine-year old daughter from her bedroom into the living room. Fitzgerald asked Lynch to tell him where the marijuana was located. Lynch insisted that he did not have it and claimed that it was in another man's possession. Whitney Lynch emerged from her bedroom at the sound of the commotion and was assaulted by a robber, who attempted to remove her pants. She struggled with him while he demanded that she show him where the money and drugs were located. She was then dragged into the living room by her hair. The three robbers eventually took Lynch's cell phone and departed.

B.

On July 26, 2012, Taylor was indicted by a grand jury in the Western District of Virginia on two counts of Hobbs Act robbery under 18 U.S.C. § 1951(a) and two counts of using a firearm in furtherance of a crime of violence under 18 U.S.C. § 924(c). Taylor's first trial resulted in a hung jury.

Appendix K

A second trial was conducted from January 23 to 25, 2013. Before the second trial commenced, the government moved to preclude Taylor from offering evidence that robbing a drug dealer who sells marijuana grown within the borders of Virginia does not affect interstate commerce and thus does not violate the Hobbs Act. Taylor filed a Motion to Dismiss, contending that such a ruling would violate his constitutional right to present a complete defense. The district court held a hearing after which it granted the government's motion on the grounds that the enterprise of drug dealing affects interstate commerce as a matter of law under *United States v. Williams*, 342 F.3d 350 (4th Cir. 2003). See also *United States v. Tillery*, 702 F.3d 170, 175 (4th Cir. 2012) (upholding conviction for Hobbs Act robbery of a business because it impacted interstate commerce "in the aggregate").

On January 25, the jury convicted Taylor on three of the four counts in the indictment, including both of the Hobbs Act offenses. With regard to the Hobbs Act crimes, the jury found Taylor guilty of "knowingly and unlawfully taking and obtaining, or attempting to take or obtain, by robbery, items having an effect on interstate commerce by means of actual and threatened force, violence, and fear of injury." J.A. 702. Taylor moved to set aside the verdict on the basis that the government had not offered evidence that Taylor's actions had affected interstate commerce. The district court denied Taylor's motion. The court then sentenced Taylor to 336 months in prison followed by supervised release for three years. Taylor now appeals.

II.

Taylor argues that the government failed to present sufficient evidence that his robberies affected interstate commerce under the Hobbs Act. He also contends that the district court erred in prohibiting him from showing that his robberies of dealers of Virginia-grown marijuana likely did not impact interstate commerce.

A.

We note at the outset the extraordinary breadth and reach of the Hobbs Act. That law reads, in pertinent part:

> Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be [punished].

18 U.S.C. § 1951(a). A Hobbs Act crime, then, has two elements: "(1) robbery or extortion, and (2) interference with commerce." *Tillery*, 702 at 174. With regard to the second element, it is impossible to ignore Congress' repeated use of the word "any." Indeed, the Supreme Court has recognized that the Hobbs Act "speaks in broad language, manifesting a purpose to use all the constitutional power Congress has to punish interference with interstate commerce . . . ." *Stirone v. United States*,

361 U.S. 212, 215 (1960). Thus, the jurisdictional predicate of the Hobbs Act requires only that the government prove a "minimal" effect on interstate commerce. *United States v. Spagnolo*, 546 F.2d 1117, 1119 (4th Cir. 1976).

Such an impact is not difficult to show. The effect may be so minor as to be *de minimis*, *United States v. Buffey*, 899 F.2d 1402, 1404 (4th Cir. 1990), and may be demonstrated by "proof of probabilities," *United States v. Brantley*, 777 F.2d 159, 162 (4th Cir. 1985). Moreover, the government is not required to prove that the "defendant intended to affect commerce or that the effect on commerce was certain; it is enough that such an effect was the natural, probable consequence of the defendant's actions." *Williams*, 342 F.3d at 354.

To determine whether a robbery affects commerce, we do not simply examine the effect of the individual action in question; it is sufficient that the "relevant class of acts" has a measureable impact on interstate commerce. *Tillery*, 702 F.3d at 174 (internal quotation marks omitted). Considering the class of activities in the aggregate in order to determine whether they impact interstate commerce is nothing new. The Supreme Court has repeatedly found that Congress may regulate conduct under the Commerce Clause that, in the aggregate, impacts interstate commerce. *See, e.g., Gonzales v. Raich*, 545 U.S. 1, 18-19, 22 (2005) (holding that Congress may regulate intrastate marijuana market because of its aggregate impact on interstate commerce); *Wickard v. Filburn*, 317 U.S. 111, 128-29 (1942) (finding that Congress is permitted to regulate activities that, when "taken

together with th[ose] of many others similarly situated," have an effect on interstate commerce).

We have likewise recognized that, because the Hobbs Act reflects the full breadth of Congress' commerce power, the aggregation principle applies in the Hobbs Act context. *See Tillery*, 702 F.3d at 174-75; *Williams*, 342 F.3d at 355. Indeed, to focus exclusively on an individual act would wholly undermine Congress' purpose in adopting the Hobbs Act: to protect commercial, interstate activity from criminal disruption. *See United States v. Culbert*, 435 U.S. 371, 373 (1978) (finding that the words of the Hobbs Act "do not lend themselves to restrictive interpretation").

In so ruling, we note the large number of circuits that agree that the aggregation principle applies in the context of a Hobbs Act violation. *See United States v. Powell*, 693 F.3d 398, 402 (3d Cir. 2012) ("[B]ecause the Hobbs Act contains a jurisdictional element and criminalizes the 'fundamentally economic' crimes of robbery and extortion, violations of the Act have a substantial effect on interstate commerce in the aggregate, and the government need not prove a substantial effect in each individual case.") (citations omitted); *United States v. Robinson*, 119 F.3d 1205, 1214 (5th Cir. 1997) (same); *United States v. Davis*, 473 F.3d 680, 683 (6th Cir. 2007) (same); *United States v. Marrero*, 299 F.3d 653, 655 (7th Cir. 2002) (same); *United States v. Bolton*, 68 F.3d 396, 399 (10th Cir. 1995) (same); *United States v. Guerra*, 164 F.3d 1358, 1361 (11th Cir. 1999) (same). "Any other rule would leave the federal government helpless to deal with criminal acts that have an individually trivial but cumulatively significant effect

on the movement of goods and services across state and international boundaries." *United States v. Thomas*, 159 F.3d 296, 298 (7th Cir. 1998).

The requirement that the precise effect on commerce be traced in each and every case would not only damage the aggregation principle and the class of acts principle that underlies it; it would also raise concerns of practicality which militate against a requirement of showing every charged crime's precise commercial effect. *See Marrero*, 299 F.3d at 655 ("Nor is it necessary that the individual criminal act . . . be shown to have a measurable impact on commerce, which would usually be impossible to show. It is enough if the class of acts has such an impact."). To the extent that *United States v. Needham*, 604 F.3d 673 (2d Cir. 2010), is in tension with our holding, we note simply the observation of Judge Cabranes that "'commerce' for purposes of the Hobbs Act -- that is, 'commerce over which the United States has jurisdiction,' 18 U.S.C. § 1951(b) -- encompasses marijuana that is grown, processed, and sold entirely within a single state." *Id.* at 688 (Cabranes, J., dissenting in part and concurring in part). If there is to be a "marijuana exception" to traditional Hobbs Act principles, that is a policy choice for the Congress to make. Until it does, we shall follow the plain lessons of Supreme Court cases and our own precedent, which must of necessity govern our disposition of this case.

It is of no relevance that the market for a certain commodity may be illegal. The jurisdictional predicate in the Hobbs Act speaks of "commerce," not just "legal" or "legitimate" commerce, and commerce is well understood

to encompass unlawful transactions. *See Raich*, 545 U.S. at 18-19 (holding that the Commerce Clause empowers Congress to regulate and criminalize the national market for marijuana). Drug dealing is a commercial enterprise and robberies of drug dealers threaten that enterprise; that is enough for a federal court to exercise jurisdiction under the Hobbs Act. *See Williams*, 342 F.3d at 354 (finding that "robberies of drug dealers . . . impact[] a trade that plainly is both economic and interstate in character").

Finally, it is not dispositive that the robberies involved the invasion of the victims' homes. Many businesses, including illegal drug enterprises, operate out of homes. As the Supreme Court has emphasized, commercial activities in or near the home may have a significant cumulative effect upon interstate commerce. *See Raich*, 545 U.S. at 19 (holding that, "when viewed in the aggregate, . . . Congress had a rational basis for concluding that leaving home-consumed marijuana outside federal control would . . . affect price and market conditions"); *Wickard*, 317 U.S. at 128 ("It can hardly be denied that a factor of such volume and variability as home-consumed wheat would have a substantial influence on price and market conditions."). Thus, the locus of the commercial activity is not the litmus test of a Hobbs Act violation.

B.

We now turn to the merits of Taylor's claims. He first contends that the government was required to offer particularized evidence that his personal robberies

affected interstate commerce and that, because the government offered no such evidence, the district court lacked jurisdiction over his prosecution under the Hobbs Act. In an appeal contesting the sufficiency of the evidence, we view "the evidence and the reasonable inferences to be drawn therefrom in the light most favorable to the Government" and uphold the verdict if it is supported by substantial evidence. *Williams*, 342 F.3d at 355 (internal quotation marks omitted).

At the conclusion of trial, the district court instructed the jury on the jurisdictional element as follows:

> In considering . . . whether there has been an obstruction, delay, or effect on interstate commerce, I tell you that the government has met its burden of proof if you find and believe from the evidence beyond a reasonable doubt that the defendant reduced the movement of articles and commodities in interstate commerce, in this case illegal drugs and drug proceeds, or attempted to do so by the robberies charged in Counts One and Three.
>
> It is not necessary for the government to prove that the defendant intended to affect interstate commerce; rather, this element may be proven by evidence that a defendant's actions were likely to affect interstate commerce, even though the actual impact on commerce is small.

J.A. 673-74. These instructions were in accord with the law as described above and Taylor's argument thus rests solely on the sufficiency of the evidence with regard to the jurisdictional predicate. But while Taylor contends that the government failed to prove the jurisdictional element, we find that the jury could rationally have found that the government met its burden.

First, it was entirely reasonable for the jury to conclude that the robberies "would have the effect of depleting the assets of an entity engaged in interstate commerce." *Buffey*, 899 F.2d at 1404. In *Williams*, we found that drug dealing was "an inherently economic enterprise that affects interstate commerce." 342 F.3d at 355. Although *Williams* involved cocaine and Taylor's robberies involved marijuana, the principle of aggregation does not apply differently for different drugs. *See Raich*, 545 U.S. at 18-19 (applying the aggregation principle to the market for marijuana). Because drug dealing in the aggregate necessarily affects interstate commerce, the government was simply required to prove that Taylor depleted or attempted to deplete the assets of such an operation.

Sufficient evidence was adduced at trial for a rational jury to find that Whorley was a drug dealer and that Taylor depleted or attempted to deplete his assets during the August 27 robbery. The record shows that the Goonz were in the business of robbing drug dealers, Fitzgerald testified that he selected Whorley's house to rob because he was informed that a drug dealer lived there, and testimony further revealed that Taylor took part in the

robbery because he expected to find drugs and drug proceeds in the home. Furthermore, Whorley admitted to having sold drugs in the past and Graham did in fact possess marijuana at the time of the robbery. A Roanoke City detective testified that drug dealers are commonly victims of repeated home invasions and that he suspected Whorley of being a drug dealer because Whorley's house had been broken into at least twice prior to the August 27 robbery.

Additionally, the money, jewelry, cell phones, and marijuana cigarette that Taylor stole are sufficient to meet the *de minimis* standard under the depletion-of-assets theory. "We have never held . . . that the depletion of assets theory has a dollar-amount minimum." *Tillery*, 702 F.3d at 175. But even if these items together do not meet that low threshold, the jury could rationally have concluded that Taylor *attempted* to steal drugs and drug proceeds, and therefore satisfied the Hobbs Act jurisdictional element. *See Brantley*, 777 F.2d at 163-64 (holding that Hobbs Act jurisdictional element may be satisfied by inchoate crimes).

Likewise, the government proffered sufficient evidence for a rational jury to conclude that Lynch was a drug dealer and that Taylor depleted or attempted to deplete his assets in the October 21 robbery. As with the robbery of Whorley, the Goonz was a group dedicated to robbing drug dealers. Fitzgerald testified that he had received intelligence from a reliable informant that Lynch was a drug dealer and had previously been robbed of twenty pounds of marijuana. Additional testimony revealed that Taylor thought there would be drugs and

drug proceeds in the house. Fitzgerald called Lynch by his nickname, "W.T.," and, when he demanded that Lynch hand over the drugs, Lynch told him that the marijuana was with another person. Moreover, a federal officer testified that Lynch admitted that he had sold drugs before the robbery without his wife's knowledge and Lynch's wife testified that he associated with suspicious characters who used and possessed illegal drugs. As with Whorley, the jury could rationally have found that Taylor attempted to deprive Lynch's operation of both drugs and drug proceeds and found jurisdiction accordingly. There was thus sufficient evidence at trial for the jury to have determined that the jurisdictional element was satisfied under a depletion-of-assets theory for both the Whorley and Lynch robberies.

Apart from the effect on the assets of an operation whose character involves interstate commerce, there was evidence that the defendant intentionally targeted a business engaged in interstate commerce. *See Powell*, 693 F.3d at 405. While evidence of the defendant's intent is not required to prove that his robberies had an impact on interstate commerce, that intent is still probative on the question of whether his actions would have had the "natural consequence[]" of affecting such commerce. *See id.* (finding jurisdictional element met because defendant "deliberately sought to rob business owners to obtain proceeds of businesses engaged in interstate commerce").

Under the targeting theory, a defendant who robs a victim in the belief that he will recover the proceeds of an enterprise engaged in interstate commerce will not

fortuitously escape prosecution under the Hobbs Act because his target did not possess those proceeds at the precise time of the robbery. *See Brantley*, 777 F.2d at 162 ("It may be enough [to prove the jurisdictional predicate] that the parties intended to complete a transaction which would have affected commerce, though their intention was frustrated."). The amount of cash on hand in a drug dealing enterprise fluctuates dramatically; the victims were doubtless targeted by Taylor and the other Goonz in the hope they would be found at a flush moment. That they were not does nothing to vitiate Taylor's intent to target an enterprise which by its nature engages in interstate commercial activity.

The evidence here was thus sufficient for two independent reasons. Whether viewed through the lens of the effect of the defendant's crimes (depletion of assets) or his intent (targeting), the government adduced sufficient evidence in this case to meet the jurisdictional element of the Hobbs Act. We therefore sustain Taylor's Hobbs Act convictions.* As Taylor challenged his conviction for

---

* Taylor's second argument is that the district court erred in granting the government's pretrial motion in limine precluding him from presenting evidence that the marijuana at issue was grown in Virginia and thus was not connected to interstate commerce. We review the district court's evidentiary rulings for abuse of discretion. *United States v. Moore*, 27 F.3d 969, 974 (4th Cir. 1994).

The district court found that, because drug dealing enterprises inherently affect interstate commerce, any argument or evidence tending to show that the drugs in the particular case had not moved across state lines was not relevant. For the reasons expressed in Part II. A, *supra*, that ruling was correct, and the

using or carrying a firearm in furtherance of a crime of violence under 18 U.S.C. § 924(c) solely on the ground that the Hobbs Act predicate was infirm, that conviction too must be upheld.

This is not to imply that the reach of the Hobbs Act is without limits. All robberies are disruptive, but not every disruption is an obstruction of commerce. The Sixth Circuit, for example, held that the jurisdictional element of the Hobbs Act was not satisfied when the defendant stood convicted of robbing "private citizens in a private residence" of money, some of which just happened to "belong[] to a restaurant doing business in interstate commerce." *United States v. Wang*, 222 F.3d 234, 240 (6th Cir. 2000). Whatever connection between the robbery and the business was absent in *Wang* is plainly present in the case at bar.

For the foregoing reasons, the judgment of the district court is affirmed.

AFFIRMED

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trial court necessarily did not abuse its discretion in granting the government's motion.

RECORD
AND
BRIEFS

Supreme Court, U.S.
FILED
NOV 30 2015
OFFICE OF THE CLERK

No. 14-6166

IN THE

Supreme Court of the United States

DAVID ANTHONY TAYLOR,

Petitioner,

v.

UNITED STATES,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FOURTH CIRCUIT

SUPPLEMENTAL APPENDIX

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PETITION FOR CERTIORARI FILED SEPTEMBER 4, 2014
CERTIORARI GRANTED OCTOBER 1, 2015

262020

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JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA, FILED APRIL 24, 2013 ..... SA1

CLERK'S OFFICE U.S. DIST. COURT
AT ROANOKE, VA
FILED
APR 24 2013
JULIA C. DUDLEY, CLERK
BY: DEPUTY CLERK

AO 245B (Rev. 9/11 - VAW Addtions 6/05) Judgment in a Criminal Case
Sheet 1

UNITED STATES DISTRICT COURT
Western District of Virginia

UNITED STATES OF AMERICA
V
David Anthony Taylor

JUDGMENT IN A CRIMINAL CASE

Case Number: DVAW712CR000043-001

Case Number:

USM Number: 16709-084

Seth C. Weston, Esq.
Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s) _____

☐ pleaded nolo contendere to count(s) _____
which was accepted by the court.

☒ was found guilty on count(s) One, Three, and Four (1, 3, and 4)
after a plea of not guilty,

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18 U.S.C. § 1951(a)	Conspiracy to Interfere With Commerce by Threats or Violence	October 21, 2009	1
18 U.S.C. § 1951(a)	Conspiracy to Interfere With Commerce by Threats or Violence	August 27, 2009	3
18 U.S.C. 924(c)(1)(a)	Possess and Brandish Firearm in Furtherance of a Crime of Violence	August 27, 2009	4

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☒ The defendant has been found not guilty on count(s) Two (2)

☐ Count(s) _____ ☐ is ☐ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

April 23, 2013
Date of Imposition of Judgment

Signature of Judge

Glen E. Conrad, Chief United States District Judge
Name and Title of Judge

APRIL 23 2013
Date

DEFENDANT: David Anthony Taylor
CASE NUMBER: DVAW712CR000043-001

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of:

Three Hundred Thirty Six (336) Months, consisting of Two Hundred Fifty Two (252) Months as to each of Counts 1 and 3, to run concurrently, to be followed by a consecutive term of Eighty Four (84) Months, as to Count 4.

☒ The court makes the following recommendations to the Bureau of Prisons:

Placement near family at FCI Petersburg, VA.

☒ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before _____ on _____

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

a _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: David Anthony Taylor
CASE NUMBER: DVAW712CR000043-001

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of :

Three (3) Years as to each of Counts of One, Three and Four (1, 3, and 4), to run concurrently.

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

☐ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. *(Check, if applicable.)*

☒ The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. *(Check, if applicable.)*

☐ The defendant shall cooperate in the collection of DNA as directed by the probation officer. *(Check, if applicable.)*

☐ The defendant shall comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which he or she resides, works, is a student, or was convicted of a qualifying offense. *(Check, if applicable.)*

☐ The defendant shall participate in an approved program for domestic violence. *(Check, if applicable.)*

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
2) the defendant shall report to the probation officer in a manner and frequency directed by the court or probation officer;
3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4) the defendant shall support his or her dependents and meet other family responsibilities;
5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;
7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and
13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such no tifications and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: David Anthony Taylor
CASE NUMBER: DVAW712CR000043-001

SPECIAL CONDITIONS OF SUPERVISION

1 The defendant shall reside in a residence free of firearms, ammunition, destructive devices, and dangerous weapons.

2 - The defendant shall submit to warrantless search and seizure of person and property as directed by the probation officer, to determine whether the defendant is in possession of firearms or illegal controlled substances.

AO 245B (Rev. 9/11 VAW Additions 6/05) Judgment in a Criminal Case
Sheet 5 - Criminal Monetary Penalties

DEFENDANT: David Anthony Taylor
CASE NUMBER: DVAW712CR000043-001

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Fine	Restitution
TOTALS	$ 300.00	$ 1,000.00	$

☐ The determination of restitution is deferred until _____ An *Amended Judgment in a Criminal Case* (AO 245C) will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss*	Restitution Ordered	Priority or Percentage

TOTALS	$0.00	$0.00

☐ Restitution amount ordered pursuant to plea agreement $ _____

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ the interest requirement is waived for the ☐ fine ☐ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

*Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 13, 1996.

AO 245B (Rev. 9/11 - VAW Additions 6/05) Judgment in a Criminal Case
Sheet 6 - Schedule of Payments

DEFENDANT: David Anthony Taylor

CASE NUMBER: DVAW712CR000043-001

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, the total criminal monetary penalties are due immediately and payable as follows:

A ☒ Lump sum payment of $ 300 immediately, balance payable

☐ not later than _____, or

☒ in accordance ☐ C, ☐ D, ☐ E, ☒ F or, ☐ G below); or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, ☐ F, or ☐ G below); or

C ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of $ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or

D ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of $ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☒ During the term of imprisonment, payment in equal monthly (e.g., weekly, monthly, quarterly) installments of $ 25, or 25 % of the defendant's income, whichever is less, to commence 60 days (e.g., 30 or 60 days) after the date of this judgment; AND payment in equal monthly (e.g., weekly, monthly, quarterly) installments of $ 50 during the term of supervised release, to commence 60 days (e.g., 30 or 60 days) after release from imprisonment.

G ☐ Special instructions regarding the payment of criminal monetary penalties:

Any installment schedule shall not preclude enforcement of the restitution or fine order by the United States under 18 U.S.C §§ 3613 and 3664(m).

Any installment schedule is subject to adjustment by the court at any time during the period of imprisonment or supervision, and the defendant shall notify the probation officer and the U.S. Attorney of any change in the defendant's economic circumstances that may affect the defendant's ability to pay.

All criminal monetary penalties shall be made payable to the Clerk, U.S. District Court, P.O. Box 1234, Roanoke, Virginia 24006, for disbursement.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

Any obligation to pay restitution is joint and several with other defendants, if any, against whom an order of restitution has been or will be entered.

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

No. 14-6166

Supreme Court, U.S.
FILED
NOV 30 2015
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

DAVID ANTHONY TAYLOR,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR PETITIONER

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QUESTION PRESENTED

1. Whether, in a federal criminal prosecution under the Hobbs Act, 18 U.S.C. §1951, the Government is relieved of proving beyond a reasonable doubt the interstate commerce element by relying exclusively on evidence that the robbery or attempted robbery of a drug dealer is an inherent economic enterprise that satisfies as a matter of law, the interstate commerce element of the offense.

PARTIES TO THE PROCEEDINGS BELOW

Petitioner, David Anthony Taylor was the defendant in the district court and the appellant in the Fourth Circuit.

Respondent the United States of America prosecuted the case in the district court and was the appellee in the Fourth Circuit.

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OPINIONS BELOW

The judgment of conviction and sentence of the District Court for the Western District of Virginia can be found at Joint Appendix (JA-A) 3a, Record 135, The transcript of the court's oral order granting the Government's motion in limine can be found at JA-F, pp. 23a – 58a.

The opinion of the Fourth Circuit affirming the district court's judgment is reported, *United States v. Taylor*, 754 F.3d 217 (4th Cir. 2014), and reproduced at JA-K, pp. 71a – 86a. The relevant orders of the district court are unreported and reproduced at JA-G, pp. 59a – 60a.

JURISDICTION

The court of appeals issued its decision on June 6, 2014. JA-K, p. 71a. The petition for certiorari was timely filed and granted on October 1, 2015. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Hobbs Act, 18 U.S.C. § 1951, provides in relevant part:

> (a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery, . . . shall be fined under this title or imprisoned not more than twenty years, or both.
>
> (b) As used in this section –

(1) The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

* * *

(3) The term "commerce" means within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

STATEMENT OF THE CASE

The government charged petitioner with two counts of obstruction, delaying and affecting commerce by robbery under the Hobbs Act accusing him of the "robbery of marijuana and drug proceeds from another person against his will by the use of actual or threatened violence." Additionally petitioner was charged with two counts of "possession a firearm in furtherance of a crime of violence in violation of Title 18 U.S.C. § 924(c)." JA-B, pp. 11a – 14a. Following trial by jury the petitioner was found guilty of

two counts of violation of the Hobbs Act and one count of 18 U.S.C. § 924(c). JA-I, pp. 67a – 69a. The Fourth Circuit upheld petitioner's conviction, accepting the government's theory that drug dealing in the aggregate *per se* affects interstate commerce, requiring the government to simply prove that petitioner depleted or attempted to deplete the assets of such an operation. The Fourth Circuit rejected petitioner's theory that the government was required to prove that the subject of the robbery, marijuana and drug proceeds, traveled in interstate commerce.

A. Statutory Background

Congress enacted the Hobbs Act in 1946 to address acts of robbery and extortion committed by organized labor. *See* Act of July 3, 1946, ch. 537, § 1(c), 60 Stat. 420; *United States v. Culbert*, 435 U.S. 371, 376-77 (1978). The Act imposes criminal liability on "[w]hoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do." 18 U.S.C. § 1951(a). It defines "robbery" as "the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining." *Id.* § 1951(b)(1). "Commerce" is defined as "commerce within the district of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, or Possession of the United States; all commerce between any point outside thereof; all

commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction." *Id.* § 1951(b)(3). Violations are punishable by up to twenty years' imprisonment. *Id.* § 1951(a).

B. Factual Background

Petitioner, David Anthony Taylor, is a resident of Roanoke, Virginia. Home invasions began occurring in the Roanoke area in late 2007 and ended in early 2010. Specifically the residences of William Lynch ("Lynch") on October 21, 2009 and Joshua Worley ("Worley") on August 27, 2009. ATF Special Agent William Cunningham became involved in the investigation along with members of local law enforcement, including but not limited to Roanoke County Police Office, Betsy Van Patten. The investigation led to the conclusion that the perpetrators were targeting drug dealers for armed home invasions. JA-A, p.4a, Record 159, pp. 123 – 124. Among the recurring names of suspects were George Fitzgerald, Dejuan Lemons, Warren Lemons, Kevin Ferguson, A. J. Claytor, and Chris Nichols (Mills). JA-A, p. 4a, Record 159, p. 2419: 12-13.

On May 24, 2012 Petitioner was indicted in a two count indictment alleging in Count One that on or about October 21, 2009 he affected commerce by robbery in the taking of "marijuana and drug proceeds, as well as a cellular telephone from the person and property of "WL,"" later identified as Lynch, a violation of the Hobbs Act. Count Two alleged that on or about October 21, 2009 that he possessed and brandished a firearm in furtherance of a crime of violence in violation of Title 18, U.S.C. § 924(c). Prior to trial a four count Superseding Indictment was

returned on July 26, 2012. In addition to the two counts in the original Indictment, Count Three alleged that on or about August 27, 2009 Petitioner affected commerce by robbery in the taking of "marijuana and drug proceeds from the person and property of "JW,"" later identified as Worley. Count Four alleged that on or about August 27, 2009 that he possessed and brandished a firearm in furtherance of a crime of violence in violation of Title 18 U.S.C. § 924(c). JA-B, pp. 11a – 14a.

C. October 22 – 24, 2012 Jury Trial – Hung Jury

Petitioner plead not guilty and proceeding to trial beginning October 22, 2012. During the trial evidence was adduced that suggested robberies had occurred. However, the evidence was unclear as to the element of "interstate commerce." At the conclusion of the evidence the Trial Court offered instructions regarding the elements necessary for a finding of a Hobbs Act violation:

> It is charged in Count One of the Indictment that on or about October 21, 2009, in the Western Judicial District of Virginia, the defendant, David Anthony Taylor, did knowingly willfully, and unlawfully obstruct, delay and affect commerce . . . by robbery . . . in that the defendant did . . . take and attempt to take and obtain marijuana and drug proceeds, as well as a cellular telephone from the person of W. L., against W. L.'s will, by means of actual and threatened force, violence, and fear of injury . . . in violation of 18, U.S.C., §§ 1951(a) and (2). Count One.

It is charged in Count Three of the Indictment that on or about August 27, 2009, in the Western Judicial District of Virginia, the defendant, David Anthony Taylor, did knowingly willfully, and unlawfully obstruct, delay and affect commerce . . . by robbery . . . in that the defendant did . . . take and attempt to take and obtain marijuana and drug proceeds from the person of J.W., against J. W.'s will, by means of actual and threatened force, violence, and fear of in jury . . . in violation of 18, U.S.C., §§ 1951(a) and (2).

To find the defendant guilty of these charges, the government must prove three elements beyond a reasonable doubt:

First, that the defendant knowingly obtained or took the personal property of another or from the presence of another;

Second, that the defendant took this property against the victims will by actual or threatened force, violence or fear of injury, whether immediately or in the future;

And, third, that as a result of the defendant's action, interstate commerce or an item moving in interstate commerce was delayed, obstructed, or affected in some way or degree.

In considering the third element, whether the robbery affected interstate commerce, I instruct you that the effect on interstate

> commerce need not be adverse or especially great, nor it is necessary for the government to prove that the defendant intended to affect interstate commerce; rather, this element may be proven by evidence that a defendant's actions were likely to affect interstate commerce, even though the actual impact on commerce was small.
>
> The term "commerce," as previously used in the instructions, means any commerce within the District of Columbia or any territory or possession of the United States, all commerce between any point in a state, territory, possession, or the District of Columbia, and any point outside thereof; all commerce between points within the same state through any place outside such state, and all other such commerce over which the United States has jurisdiction.

JA-A, p. 1a; Record 70, pp. 474 – 478.

During deliberations the jury sought clarification of the interstate commerce element asking "[I]n testimony do we consider "looking for stuff" interstate commerce." JA-A, p. 1a; Doc. 55, p. 140. The inquiry of the jury clearly demonstrating questions regarding proof of the interstate commerce element necessary for a conviction under the Hobbs Act.

Shortly thereafter the jury announced that they could not reach a unanimous verdict. *JA-A, p.2a, Record. 71, p.*

502: 18-21. The Trial Court then granted the Government's motion for mistrial and rescheduled for a new trial. *JA-A, p. 2a, Doc. 71, pp. 504:19.*

D. January 23 – 25, 2013 Jury Trial – Guilty Verdict, Counts One, Three and Four

January 23 – 25, 2013 Taylor was again tried in the Western District of Virginia, Roanoke Division, pursuant to the 4-count superseding indictment. On January 25, 2013 he was acquitted of one count of possessing a firearm in furtherance of a robbery. He was convicted of (1) two counts of Hobbs Act robbery and (2) one count of using a firearm in furtherance of a robbery. *JA-I, pp. 67a-69a.*

By final judgment entered April 24, 2013, Petitioner was sentenced to, *inter alia*, imprisonment for a term of 336 months. *JA-A, p. 3a; Record 135.* On April 25, 2013 Mr. Taylor filed a timely notice of appeal. *JA-J, p. 70a.*

E. Pretrial Motion

On December 13, 2012 the Government filed a Motion in Limine to preclude the introduction of evidence or argument that marijuana dealers dealing in marijuana grown "in-state" would not be a violation of the Hobbs Act. *JA-C, pp. 15a-17a.* Arguing that all robberies of "drug dealers" *per* se satisfied the interstate commerce element necessary for a Hobbs Act Conviction, the Government relied upon *United States v. Williams*, 342 F.3d 350 (4th Cir. 2003) in support of the Motion. Petitioner responded with a Motion to Dismiss (*JA-E, pp. 21a-22a*) arguing under the Fifth and Sixth Amendments to the United States Constitution he had a Constitutional due process

right to present evidence and argue that the robbery of a dealer of intrastate grown marijuana did not have an effect on interstate commerce. The District Court conducted a motions hearing on January 3, 2013. *JA-F, pp. 24a-58a.* Adopting the Government's reliance on *Williams, supra,* the District Court ruled in favor of the Government's Motion in Limine stating "the defendant may not present any evidence or argument that the robbery or attempted robbery of drug dealers who deal only in Virginia-grown marijuana would not violate the Hobbs Act." *JA-F, p. 46a.* The decision was followed by an Order of the District Court entered January 4, 2013. *JA-G, pp. 59a-60a.* This decision precluded the Petitioner from presenting his theory of defense that the robbery of marijuana dealers dealing in marijuana grown "in-state" had no proven effect on the interstate commerce element necessary for a Hobbs Act conviction, in essence denying him of due process and the right to call witnesses in his behalf as guaranteed by the Fifth and Sixth Amendments respectively.

F. Evidence at Trial

(i) Evidence with Respect to the Robbery of Worley

The Government's case against Petitioner for the robbery of Lynch was comprised principally of the testimony the victims and cooperating witnesses, George Fitzgerald ("Fitzgerald"), the organizer of the robberies and Anthony Claytor ("Claytor"), an accomplice.

According to the testimony of Fitzgerald, he, Claytor, Petitioner and Dejuan Lemons ("Lemons") on the evening of August 27, 2009 travelled to 3433 Ridgerun, Roanoke,

Virginia with the intent to rob Worley. Fitzgerald had been told that Worley was a marijuana dealer with access to drugs and cash. *JA-A, p. 4a; Record 159, p.2383: 1-15;* 2388: 2-3; 2406: 9-18. He had no specific knowledge that drugs would be found. *JA-A, p. 4a; Record 159, pp. 2405-2406: 16-7.*

Upon arriving at the residence Petitioner kicked the door open. Petitioner, Lemons and Fitzgerald entered the residence and made their way to the bedroom where Worley and his live-in girlfriend, Latasha Graham ("Graham") were found. *JA-A, p. 4a; Record 159, p. 2384: 17-18: p. 2386: 5-14.* Claytor waited outside the residence. *JA-A, p. 4a; Record 159, p. 2388: 4-7.*

During the course of the robbery no marijuana, drugs or money was found by the trio. Fitzgerald testified that Petitioner removed rings from the finger of Graham, taking the rings and some money from a pocketbook on the bedroom dresser. *JA-A, p. 4a; Record 159, p. 2388: 18-25; p. 2396: 1-6.* The trio then left the Worley residence.

Claytor testified that all four entered the residence and that Lemons was responsible for the forced entry. *JA-A, p. 5a; Record 160, p. 1930: 17-22; p. 1931: 6-9; p. 1938: 8-10.*

Worley, age 24, testified that he resided in the residence with his girlfriend, Graham, and her two children. *JA-A, p. 4a; Record 159, pp. 2462-2463: 25-1.* He provided testimony that he was not a drug dealer and specifically was not selling exotic weed. *JA-A, p. 4a; Record 159, p. 2466: 3-15; p. 2485: 5-19.* He testified that he had no drugs or money in the residence at the time of the robbery. *JA-A, p. 4a; Record 159, p. 2472: 1-2.*

Graham, age 27, testified that on the evening of August 27, 2009 three men came into their bedroom and they were robbed. *JA-A, p. 4a; Record 159, p. 2498: 2-5.* Graham had smoked marijuana from high school up to the time of the robbery, but neither she nor Worley sold marijuana or any other drugs. *JA-A, p. 4a; Record 159, p. 2498: 18-20.* When the three men entered the bedroom they stated they were looking for money and weed and she advised they didn't have any. *JA-A, p. 4a; Record 159, pp. 2505-2506: 17-7.* The net proceeds taken during the robbery was $40 and jewelry. *JA-A, p. 4a; Record 159, pp. 2511-2512: 20-25.*

There was no testimony that either Worley, Graham or the children residing in the residence were drug dealers or that anyone possessed marijuana or any other narcotics at the time of the robbery.

(ii) Evidence with Respect to Robbery of Lynch

Fitzgerald was again called by the Government as a principal witness in the Lynch robbery. He testified that a Chris Nichols and his cousin had robbed a guy for 20 pounds of marijuana in front of the Lynch residence and that he expected to find marijuana and probably money. *JA-A, 5a; Record 160, p. 2013: 13-18*; *Record 160, p. 2017: 7-9.* The Lynch robbery was carried out by himself, Lemons and Petitioner. *JA-A, 5a; Record 160, p. 1947: 1-9.* After entering the residence the trio controlled the residents and Fitzgerald question Lynch about the presence of weed. Lynch denied that there was weed in the house and stated a guy named Mark had weed. *JA-A, 5a; Record 160, p. 2019: 1-13.* After determining that there was no weed or money in the residence the trio left the residence. *JA-A, 5a; Record 160, p. 2021: 1-3.*

During questioning by the District Court, Fitzgerald testified they were operating in the blind and didn't know if there would be marijuana and/or money present. This was described as "hit or miss" operation, by Fitzgerald. *JA-A, 5a; Record 160, pp. 2027-2028: 20-18.*

Whitney Lynch, wife of Lynch, testified that she was in a bedroom when the trio entered her home. Instinctively she called 911 and placed her phone under the bed. *JA-A, 5a; Record 160, p. 2033: 13-17.* She was questioned about money and weed repeatedly, but responded that they had no money, weed or safe. *JA-A, 5a; Record 160, p. 2034: 4-6, 18-19.* During the time the trio was in the Lynch residence the only thing that was taken was a cell phone. *JA-A, 5a: Record 160, p. 2037: 15-17.* Following a thorough search of the residence one of the three said "everybody out of the house. Let's go" the trio then left. *JA-A, 5a; Record 160, p. 2036: 7-13.* Mrs. Lynch testified on cross examination that neither she nor her husband dealt in drugs, including but not limited to marijuana and that she had no knowledge of a previous drug robbery at or near her home of 20 pounds of marijuana. *JA-A, 5a; Record 160, p. 2048-2049: 23-17.*

The Government called Michelle Tringali, Roanoke City E-911 dispatcher to testify as to the 911 call of Whitney Lynch. In the call, admitted into evidence, a male voice can be heard directing Mrs. Lynch to get on the bed and asking her for money and for weed. *JA-A, 5a; Record 160, p. 1984: 23-25.*

The Government never called Chris Nichols to the stand to testify regarding the alleged 20 pound marijuana robbery. There was no testimony from any witness that marijuana or any other drugs were present in the

residence at the time of the robbery. To the contrary the testimony established that there was no marijuana or any other drugs present and that neither Mrs. Lynch nor Mr. Lynch were drug dealers, specifically marijuana distributors.

The Government offered no testimony, expert or otherwise, that marijuana traveled in interstate commerce or the interstate commerce of drugs in general. Neither was evidence offered by the Government that the subject robberies had an effect on interstate commerce.

G. Procedural History

At the conclusion of the evidence Taylor moved to strike the Government's case resulting from the failure of the Government to prove the jurisdictional element of interstate commerce. This motion was denied with the ruling that the District Court believed there was sufficient evidence to satisfy the interstate commerce requirement based upon an attempt to steal drugs and that drugs were the type commodity that impacted interstate commerce. *JA-A, 5a; Record 160, pp. 2192-2193: 10-7.* This ruling ignored the testimony from the victims and accomplices which clearly demonstrated that marijuana was the specific drug targeted in the robberies and named in the Superseding Indictment.

The jury heard arguments and was then instructed as to the law of the case regarding Counts One and Three. Specifically as to the element of interstate commerce "I tell you that the government has met its burden of proof if you find and believe from the evidence beyond a reasonable doubt that the defendant reduced the movement of articles

and commodities in interstate commerce, in this case illegal drugs and drug proceeds, or attempted to do so by the robberies charged in Counts one and Three." *JA-H, p. 63a.*

On January 25, 2013, after a three day trial, Taylor was convicted of two counts of robbery of items having an effect on interstate commerce and one count of possession a firearm in furtherance of robbery. *JA-I, pp. 76a-69a.* Taylor was acquitted of one count of possessing a firearm in furtherance of a robbery. The first robbery count was with respect to the alleged robbery of one William Thomas Lynch ("Lynch") on 3030 Parham Drive, Roanoke, Virginia which occurred on October 21, 2009. The second alleged robbery was of one Josh Worley ("Worley") on 3343 Ridgerun, Roanoke, Virginia which occurred on August 27, 2009. Taylor was also convicted of possessing and/or using a firearm in connection with the alleged robbery of Worley.

Taylor then made a motion to set aside the jury's verdict as being contrary to the law and evidence based upon the Government's failure to prove the element of interstate commerce. *JA-A, p. 5a; Record 161, p. 2289: 1-13.* The Trial Court denied the motion reasoning "[T]he Court understands the law to be that if the jury is satisfied beyond a reasonable doubt that the defendant engaged in a Hobbs Act robbery, the object of which was to recover drugs from a drug dealer, that suffices to satisfy the interstate commerce requirement under the Hobbs Act." *JA-A, p. 5a; Record 161, p. 2289- 2290: 21-5.*

SUMMARY OF AGRUMENT

This Court should reverse the Fourth Circuit's decision. It cannot be reconciled with the text and structure of the Hobbs Act, and it is contrary to basic principles of due process and federal criminal law.

I. The Hobbs Act imposes criminal liability on "whoever" affects "commerce" by "robbery," defining "commerce" as "all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the Unites States has jurisdiction" and "robbery" as "the unlawful taking or obtaining of personal property from the person . . . against his will, by means of actual or threatened force, or violence, ..." 18 U.S.C. § 1951 (a)(b)(1) and (3). The natural and only plausible reading of the statute requires that the robbery be of an item that has traveled in or affects commerce. The Hobbs Act does not regulate robbery for the sake of regulating robbery, rather, the Hobbs Act regulates interference with economic activity by robbery.

This straightforward reading is confirmed by the Hobbs Act's structure and the context in which the "affects commerce" language appears. The Act imposes liability on "whoever" "affects commerce" by "robbery" from a person of his/her personal property, making clear that the personal property taken or intended to be taken from the person has traveled in or affected commerce. The taking of personal property originating intrastate and never traveling interstate by robbery does not trigger liability under the Act.

Upon a proper interpretation of the Hobbs Act, petitioner's conviction cannot stand. The government offered no evidence at trial that the personal property made the subject of the robbery, marijuana, had traveled in or affected commerce. Indeed as a result of the district court's motion in limine ruling they were not required to offer such evidence. The greater gravamen of this ruling denied Petitioner of his due process by prohibiting him from presenting evidence regarding intrastate grown marijuana and its lack of impact on commerce, a theory critical to his defense. The district court should have denied the government's motion in limine or, failing that, the Fourth Circuit should have reversed his conviction.

II. The plain statutory text should have been the beginning and end of this case. The phrases "personal property," "affects commerce" and "robbery" are independent elements that must be proven beyond a reasonable doubt before Hobbs Act liability attaches. Instead, the Fourth Circuit adopted an interpretation of the Act that is contrary to the text and unpersuasive. The Fourth Circuit's interpretation ignores the statute's specific "personal property" element and erroneously substitutes a "class of acts" as an element of the offense. Simply put, the adoption of the Fourth Circuit's interpretation creates an irrebuttable presumption of guilt, when the specific personal property element made the subject of the robbery is substituted with a "class of acts" element.

ARGUMENT

I. To Establish A Hobbs Act Robbery, The Government Must Prove That A Person Committed A Robbery Of Personal Property Of Another Person And The Robbery Of The Personal Property Had An Effect On Commerce.

"In analyzing a statute," this Court "begin[s] by examining the text." *Carter v. United States*, 530 U.S. 255, 271 (2000). Unless otherwise defined, statutory terms are "interpreted as taking their ordinary, contemporary, common meaning." *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 134 S. Ct. 1749, 1756 (2014).

These basic rules of interpretation carry special force in the interpretation of criminal statutes, a contest where vagueness and imprecision are to be avoided. A criminal statute must give a "person of ordinary intelligence a reasonable opportunity to know what is prohibited." *Gayned v. City of Rockford*, 408 U.S. 104, 108 (1972); *see also Smith v. Goguen*, 415 U.S. 566, 574 (1974) (criminal statute must draw "clear Lines" between conduct that is prohibited and conduct that is not). Accordingly, courts should not "give the text a meaning that is different from its ordinary, accepted meaning." *Burrage v. United States*, 134 S. Ct. 881, 891 (2014).

In this case, the statutory text, structure, and common sense all point in one direction: The crime of robbery under the Hobbs Act requires that the government prove that the specific personal property made the subject of the robbery affects commerce.

A. The Fourth Circuit's Holding That Drug Dealing Is An Inherently Economic Enterprise That Affects Interstate Commerce Such That The Government Is Not Required To Prove That A Specific Robbery Affected Interstate Commerce Is Inconsistent With The Due Process Requirement That The Government Prove Each Element Of A Criminal Offense Beyond A Reasonable Doubt.

Marijuana is the only major drug grown within the borders of the United States. Twenty-three states and the District of Columbia currently have laws legalizing marijuana in some form. Four states and the District of Columbia[1] have legalized marijuana for recreational use. In Alaska, adults 21 and older can now transport, buy or possess up to an ounce of marijuana and six plants.[2] As of July 1, 2015 Oregon allows adults to possess up to an ounce of marijuana in public and 8 ounces in their homes.[3] Colorado[4] and Washington[5] previously passed similar ballot measures legalizing marijuana in 2012.

"The requirement that guilt of a criminal charge be established by proof beyond a reasonable doubt dates at least from our early years as a Nation." *In re Winship*,

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1. D.C. Code § 48-904.01.

2. Alaska Stat. § 17.38.020.

3. ORS § 475.864.

4. Colo. Const. Art. XVIII, § 16.

5. Washington Initiative 502, November 6, 2012; Rev. Code Wash. § 69.50.101 et seq.

397 U.S. 358, 361, 90 S. Ct. 1068, 1071, 25 L. Ed. 2d 368 (1970). Under the Due Process Clause, "[t]he prosecution bears the burden of proving all elements of the offense and must persuade the factfinder beyond a reasonable doubt of the facts necessary to establish each of those elements." *Sullivan v. Louisiana*, 508 U.S. 275, 277-78, 113 S. Ct. 2078, 2080, 124 L. Ed. 2d 182 (1993) (citations omitted). The jury verdict, in turn, must necessarily be based on a finding of guilt beyond a reasonable doubt on every element of the offense charged. *Id.* at 278, 113 S. Ct. at 2081, 124 L. Ed. 2d 182. The primacy of this standard of proof in criminal matters is not subject to debate. The Fourth Circuit Court of Appeals' ruling in the case below, *United States v. Taylor*, 754 F.3d 217 (4th Cir. 2014), *cert. granted*, No. 14-6166, 2015 WL 5725547 (U.S. Oct. 1, 2015), impermissibly relieves the Government of its burden to prove an element of a charge under the Hobbs Act, 18 U.S.C. § 1951(a), in violation of this well-established due process right.

The Hobbs Act "speaks in broad language, manifesting a purpose to use all the constitutional power Congress has to punish interference with interstate commerce by extortion, robbery or physical violence." *Stirone v. United States*, 361 U.S. 212, 215, 80 S. Ct. 270, 272, 4 L. Ed. 2d 252 (1960). An offense under the Act has two elements: interference with commerce, and robbery or extortion. "The charge that interstate commerce is affected is *critical* since the Federal Government's jurisdiction of this crime rests *only* on that interference." *Id.* at 218, 80 S. Ct. at 274, 4 L. Ed. 2d 252 (emphasis added). Without a clear basis for federal jurisdiction, the authority for defining and enforcing the criminal law rests with the

states. *United States v. Lopez*, 514 U.S. 549, 561 n.3, 115 S. Ct. 1624, 1631 n.3, 131 L. Ed. 2d 626 (1995).[6]

The basis for Hobbs Act jurisdiction in this case was that Petitioner was charged with robbery of suspected marijuana dealers. Thus, the pertinent jurisdictional inquiry was whether the business of the marijuana dealers affected commerce. Noting that "the jurisdictional predicate of the Hobbs Act requires only that the government prove a 'minimal' effect on interstate commerce," *Taylor*, 754 F.3d at 222, the Fourth Circuit went on to apply the so-called aggregation principle to the inquiry. Under the aggregation principle, "Congress may regulate conduct under the Commerce Clause that, in the aggregate, impacts interstate commerce." *Id.* Relying on its previous holding in *United States v. Williams*, 342 F.3d 350 (4th Cir. 2003), *cert. denied*, 540 U.S. 1169 (2004), that "[d]rug dealing . . . is an inherently economic enterprise that affects interstate commerce," *id.* at 355, the Fourth Circuit rejected the notion that it was necessary to examine the circumstances of the robberies and concluded that the Petitioner's belief that the targets of the robberies were marijuana dealers was all that was necessary to establish federal jurisdiction under the Hobbs Act. *Taylor*, 754 F.3d at 223. Because the court determined that drug dealing met the jurisdictional predicate *per se*, the Fourth Circuit found no error in the district court's grant of the Government's motion in limine precluding the Petitioner from introducing evidence that the marijuana at issue

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6. In this case, for instance, armed robbery or robbery could have been prosecuted under Virginia law. *See Ali v. Commonwealth*, 280 Va. 665, 668, 701 S.E.2d 64, 66 (2010) (setting forth elements of common-law robbery); *see also* Va. Code Ann. §§18.2-58; 18.2-90; and 18.2-10.

was grown in Virginia and, thus, did not affect interstate commerce. *Id.* at 225 n.*.

The Fourth Circuit's *per se* rule that all drug dealing affects commerce for purposes of the Hobbs Act, regardless of the circumstances of the charged offense, conflicts with the approach in the Second Circuit and the Seventh Circuit, in which the courts have held that drug dealing in and of itself is insufficient to establish that a crime affects commerce within the meaning of the Hobbs Act; there must be an individualized factual finding beyond a reasonable doubt supporting a legal conclusion of jurisdiction in a particular case. *See United States v. Needham*, 604 F.3d 673, 678 (2d Cir. 2010) (citing *United States v. Parkes*, 497 F.3d 220, 229-30 (2d Cir. 2007)), *cert. denied*, 562 U.S. 955 (2010); *United States v. Peterson*, 236 F.3d 848, 855 (7th Cir. 2001). The Fourth Circuit's *per se* rule is also inconsistent with its own Hobbs Act precedent, as well as with the due process guarantee that the Government shall prove each element of a criminal offense beyond a reasonable doubt. The Fourth Circuit has confused the *de minimis* standard that applies to proof of Hobbs Act jurisdiction with no standard. Just because the bar is low does *not* mean that the Government has no burden of proof on the jurisdictional element. *Cf. Stirone*, 361 U.S. at 218, 80 S. Ct. 270, 274, 4 L. Ed. 2d 252 (emphasizing the importance of proving jurisdiction in a Hobbs Act case). As the Fourth Circuit recognized in *United States v. Buffey*, 899 F.2d 1402 (4th Cir. 1990), "broadly as the extension of the interstate commerce requirement has spread, we are still a federal, not a unitary, government and, to satisfy the Act, the government still must show that an effect on interstate commerce is reasonably probable." *Id.* at 1404. While the

nexus between the challenged conduct—in this case, the robberies—and interstate commerce "may be *de minimis*, . . . it must nonetheless exist." *Id.* In *Buffey*, the court reversed the conviction because the Government failed to prove a reasonable probability that the defendants' attempted extortion of a wealthy businessman would have caused him to deplete company assets to satisfy the extortion demand, thus, affecting interstate commerce, because he had extensive personal assets. *Id.* at 1404-07. The court came to this conclusion only after making an individualized assessment of the facts surrounding the attempted extortion. *See also United States v. Tillery*, 702 F.3d 170, 174 (4th Cir. 2012) (finding jurisdiction based on evidence that dry cleaner where robbery took place was part of a larger network of cleaners that purchased its supplies out-of-state, including "cleaning solvents from Illinois; hangers from Alabama, Mexico, Vietnam, and China; spotting chemicals from Illinois and Missouri; gown boxes from Illinois; detergent from North Carolina; starch from Missouri; boiler conditioner from Illinois; and plastic garment bags from South Carolina. Additionally, there was testimony that the Petersburg branch used an out-of-state credit card processor and telephone company."), *cert. denied*, ___ U.S. ___, 133 S. Ct. 2369, 185 L. Ed. 2d 1088 (2013); *United States v. Robinson*, 119 F.3d 1205, 1215 (5th Cir. 1997) (jury properly found interstate commerce was affected when defendant Robinson's gang robbed stores of thousands of dollars, impairing their ability to cash out-of-state checks and to restock goods shipped from other states), *cert. denied*, 522 U.S. 1139 (1998). The rule should be no different for Hobbs Act cases related to drug dealing.

This Court's ruling in *Gonzales v. Raich*, 545 U.S. 1, 125 S. Ct. 2195, 162 L. Ed. 2d 1 (2005), that Congress has the authority to regulate intrastate-grown marijuana under the Controlled Substances Act ("CSA") did not create a Commerce Clause exception for drugs. In *Raich*, the issue was whether Congress had a rational basis for "believing that failure to regulate the intrastate manufacture and possession of marijuana would leave a gaping hole in the CSA." *Id.* at 22, 125 S. Ct. at 2197, 162 L. Ed. 2d 1. Here the pertinent inquiry was whether *in this prosecution* there was proof beyond a reasonable doubt that the robberies affected interstate commerce. As the Second Circuit observed in *Parkes*:

> Congressional findings cannot substitute for proof beyond a reasonable doubt. *See United States v. Chance*, 306 F.3d 356, 377-78 (6th Cir.2002) (rejecting the proposition that "the prosecution is relieved from proving an essential element of [a Hobbs Act] offense by proof beyond a reasonable doubt where Congress has made findings of fact concerning the area regulated"); *United States v. Peterson*, 236 F.3d 848, 855 (7th Cir.2001) (observing that "the government is conflating its burden of proof under two distinct statutory schemes—the Controlled Substances Act . . . and the Hobbs Act," and holding that the "specific findings" in the"CSA cannot excuse proof of an effect on interstate commerce in a Hobbs Act prosecution (internal citations omitted)); *United States v. Gomez*, No. 99 Cr. 740, 2005 WL 1529701, at *9 (S.D.N.Y. June 28, 2005) (McKenna, J.) ("Nothing in [Second Circuit case

> law] supports the view that the 21 U.S.C. § 801 findings have replaced the traditional Hobbs Act requirement that an effect [on interstate commerce] (however minimal or even potential) be proved."); *see also United States v. Balsam*, 203 F.3d 72, 89 (1st Cir.2000) (citing *Gaudin* for the proposition that the jury instruction that, "as a matter of law[,] the businesses at issue in this case were engaged in interstate commerce" was erroneous because it violated the defendant's constitutional "right to have a jury determine, beyond a reasonable doubt, his guilt of every element of the crime with which he is charged" (internal quotation marks omitted)).

Parkes, 497 F.3d at 229-30.

Even if the holding in *Raich* leads to the conclusion that there is federal jurisdiction over CSA prosecutions involving intrastate marijuana, it does not lead to the conclusion that drug-related robberies are subject to federal jurisdiction under the Hobbs Act. The Hobbs Act does *not* regulate the drug trade. Rather, the Hobbs Act regulates robbery and extortion. *See United States v. Bolton* , 68 F.3d 396, 399 (10th Cir. 1995) ("In enacting the Hobbs Act, Congress determined that robbery and extortion are activities which through repetition may have substantial detrimental effects on interstate commerce. *See* H.R.Rep. No. 238, 79th Cong., 1st Sess., (1945), *reprinted in* 1946 U.S.C.C.A.N. 1360, 1370 ('[T]hose persons who have been impeding interstate commerce . . . shall not be permitted to continue such practices without a sincere attempt on the part of Congress to do its

duty of protecting interstate commerce.'"), *cert. denied*, 516 U.S. 1137 (1996).

The Fourth Circuit's conclusion that the nature of the robberies, including the type of drugs the victims were believed to have, is irrelevant to the Government's proof of the jurisdictional element is not supported by the cases on which the court purported to rely. The court did not mention, for example, that the defendant in *Williams*, from which the court derived it's *per se* rule, stipulated that "drug trafficking is a business that involves interstate commerce with the interstate commodities being cocaine and crack cocaine and proceeds from drug distribution." 342 F.3d at 353. Moreover, the court gave short shrift to the notion that any distinction should be made between Petitioner, who proffered evidence that the robbery victims dealt in Virginia-grown marijuana only, and the defendant in *Williams* whose crimes involved cocaine. *Taylor*, 754 F.3d at 224. However, both *Williams* and *Taylor* relied on *United States v. Marrero*, 299 F.3d 653 (7th Cir. 2002), *cert. denied*, 537 U.S. 1145 (2003), in which the court noted that even if the victims of the robbery had not been lured across state lines from Detroit to Chicago, because the drug involved was cocaine, and "cocaine originates overseas," the robbery affected commerce. *Id.* at 655; *see also Needham*, 604 F.3d at 680 (upholding Hobbs Act conspiracy convictions because the conspiracy targeted proceeds from the sale of cocaine and heroin, which "cannot be produced in New York, and thus necessarily travel in interstate commerce"); *Needham, 604 F.3d at* 681 (Reversing Hobbs Act robbery convictions because the Government presented "no proof that the marijuana sold by the victims had originated out of state, that it was sold to out-of-state customers, that the victims themselves

crossed state lines in conducting their business, or that the robbery depleted assets that would have purchased goods in interstate commerce.").

In affirming Petitioner's conviction the Fourth Circuit relied on its precedent in *Williams, supra*. A close examination of the facts in *Williams, supra*, demonstrates a stipulation of facts agreed to by the Government and Mr. Williams. The government read to the jury the stipulation in which Williams conceded, among other things, that "drug trafficking is a business that involves interstate commerce with the interstate commodities being cocaine and crack cocaine and proceeds from drug distribution." *Williams, 342 F.3d at 353*. Having stipulated the interstate commerce jurisdictional element, the only element remaining necessary for a Hobbs Act violation was proof of the robbery element. Hobbs Act convictions have been affirmed in a number of circuits where the interstate commerce jurisdictional element was proven or stipulated. See *United States v. Gomez*, 580 F.3d 94 (2nd Cir. 2009) (reinstating Hobbs Act robbery convictions where the Government's evidence regarding interstate commerce was that the object of the robbery was three kilos of cocaine); *United States v. Walker*, 657 F.3d 160 (3rd Cir. 2011) (affirming conviction for Hobbs Act robbery where Government presented reliable expert testimony that the cocaine sold in Harrisburg is manufactured outside of Pennsylvania and transported into the state); *United States v. McCraney*, 612 F.3d 1057 (8th Cir. 2010) (affirming Hobbs Act robbery conviction where the evidence showed that the cocaine stolen from the victim necessarily originated in South America and was intended to be sold in Iowa. The taking of that cocaine disrupted the movement of a commodity in interstate commerce); *United States v.*

Rutland, 705 F.3d (10th Cir. 2013) (upholding conviction for Hobbs Act robbery where Government produced evidence that a Rock Springs, Wyoming drug dealer who obtained his drugs from a source in Salt Lake City, Utah and robbery of one-half pound of methamphetamine and $24,000 -- $30,000 in drug proceeds). In Petitioner's case there was no evidentiary foundation to show either of the victims were regularly, substantially or minimally involved in interstate commerce and most significantly if by inference they were, the Petitioner was not allowed to produce evidence that the marijuana (personal property) made the subject of the robbery traveled in or affected commerce, thus denying Petitioner the basic due process guarantees of the Constitution. "Whether rooted directly in the *Due Process Clause of the Fifth Amendment* or in the *Compulsory Process* or *Confrontation clauses of the Sixth Amendment*, the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'" *Crane v. Kentucky*, 476 U.S. 683, 690 (1986). Petitioner was denied that opportunity.

Petitioner does not contest the long-established rule that the connection to interstate commerce may be *de minimis* under the Hobbs Act. However, the fact that proof of a tenuous connection to interstate commerce satisfies the jurisdictional element does not mean that the Government must produce no evidence. Given the *de minimis* standard, it most certainly does not mean that the defendant can be barred from presenting relevant evidence countering the Government's proof on jurisdiction. Just because drug dealing is the sort of enterprise that *may* affect interstate commerce does not mean that a robbery involving drug dealing *must* affect interstate commerce.

CONCLUSION

The decision of the fourth circuit should be reversed, and the case should be remanded for further proceedings.

Respectfully submitted,

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No. 14-6166

In the Supreme Court of the United States

DAVID ANTHONY TAYLOR, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether the evidence that petitioner robbed, or attempted to rob, marijuana dealers was sufficient, as a matter of law, to satisfy the Hobbs Act's jurisdictional element that the prohibited conduct "in any way or degree" "affect[ed]" "commerce," 18 U.S.C. 1951(a), as defined by the Act to include "all * * * commerce over which the United States has jurisdiction." 18 U.S.C. 1951(b)(3).

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In the Supreme Court of the United States

No. 14-6166

DAVID ANTHONY TAYLOR, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (J.A. 71a-86a) is reported at 754 F.3d 217.

JURISDICTION

The judgment of the court of appeals was entered on June 6, 2014. The petition for a writ of certiorari was filed on September 4, 2014, and granted on October 1, 2015. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

The Hobbs Act, 18 U.S.C. 1951, is reprinted in an appendix to this brief. App., *infra*, 1a-2a.

STATEMENT

Following a jury trial in the United States District Court for the Western District of Virginia, petitioner was convicted on two counts of Hobbs Act robbery, in violation of 18 U.S.C. 1951(a) and 2; and one count of

possessing or brandishing a firearm in furtherance of a crime of violence, in violation of 18 U.S.C. 924(c). The district court sentenced petitioner to 336 months of imprisonment, to be followed by three years of supervised release. J.A. 3a-4a. The court of appeals affirmed. J.A. 71a-86a.

A. Statutory Background

The Hobbs Act, 18 U.S.C. 1951, makes it an offense for any person to "in any way or degree obstruct[], delay[], or affect[] commerce"—including any "commerce over which the United States has jurisdiction"—by robbery or extortion, or to "attempt[] or conspire[] so to do." 18 U.S.C. 1951(a) and (b)(3). That prohibition is defined through several provisions of the Act. First, Section 1951(a) defines a Hobbs Act offense by making it unlawful, *inter alia*, to "in any way or degree obstruct[], delay[], or affect[] commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempt[] or conspire[] so to do." 18 U.S.C. 1951(a). Second, Section 1951(b)(1) and (2) define the terms "robbery" and "extortion." Third, Section 1951(b)(3) defines "commerce" to mean "commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction." 18 U.S.C. 1951(b)(3).

This case concerns the Hobbs Act's application to petitioner's robberies, or attempted robberies, of persons engaged in, or believed to be engaged in, the

marijuana trade. See J.A. 11a-12a (indictment charging petitioner with robbery or attempted robbery of "marijuana and drug proceeds"); J.A. 67a-68a (petitioner was convicted of "taking and obtaining, or attempting to take or obtain, by robbery, items having an effect on interstate commerce"). Congress has long exercised comprehensive jurisdiction over the market for marijuana. In 1946, when Congress enacted the Hobbs Act, see Act of July 3, 1946, ch. 537, 60 Stat. 420, Congress regulated the marijuana trade by imposing "registration and reporting requirements for all individuals importing, producing, selling, or dealing in marijuana" and, in addition, collected "transfer taxes whenever the drug changed hands." *Gonzales* v. *Raich*, 545 U.S. 1, 11 (2005). The United States now exercises its jurisdiction to regulate the marijuana trade under the Controlled Substances Act (CSA), 21 U.S.C. 801 *et seq.*, which makes it an offense, *inter alia*, to manufacture, distribute, dispense, or possess the drug. 21 U.S.C. 841(a), 844(a); see 21 U.S.C. 812(c), Sch. I(c)(10) (listing marijuana in Schedule I); *Raich*, 545 U.S. at 13.

The CSA contains no jurisdictional element, reflecting Congress's finding that "[f]ederal control of the intrastate incidents of the traffic in controlled substances is essential to the effective control of the interstate incidents of such traffic." 21 U.S.C. 801(6); see 21 U.S.C. 801(3)-(5) (explaining the basis for that finding). Consistent with that finding, this Court has confirmed that "Congress' regulatory jurisdiction" over the marijuana trade validly extends to "the intrastate manufacture and possession of marijuana." 545 U.S. at 7, 15, 19, 27 n.37.

B. The Current Controversy

1. In 2009, cocaine and marijuana were the most common drugs sold by Roanoke drug dealers. 1/2013 Trial Tr. (Tr.) 63-64. Dealers could typically purchase a kilogram of cocaine wholesale for about $22,000 to $30,000; break the kilogram down into smaller quantities for resale; and sell retail quantities of the drug for about $100 per gram, producing a significant profit. Tr. 64-67. The marijuana trade worked similarly, and dealers could make substantial profits breaking down bulk amounts of marijuana for resale. Tr. 68-69. Such drug dealers required cash to purchase drug supplies and pay upstream debts, normally would not use banks, and stored cash in their homes. Tr. 68, 72. Roanoke drug dealers thus typically would have large amounts of cash on hand. Tr. 67-68.

The lucrative drug business spawned a separate "cottage industry" of home-invasion robberies targeting Roanoke drug dealers, which in 2009 were occurring "all over" the city. Tr. 414, 424; see Tr. 73. The "large number" of home invasions prompted the Roanoke police to seek assistance from the federal Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF). Tr. 124, 413-414. Their investigation into the series of Roanoke home invasions was later "absorbed in the overall federal investigation." Tr. 416.

During this period, the Southwest Goonz—a home-invasion gang led by George Fitzgerald—flourished. Tr. 79-81, 416. The gang targeted drug dealers because of the significant quantities of cash, drugs, and high-end consumer goods dealers typically possessed, Tr. 67-68, 72, 81, 108-109, and because dealers often would not report such thefts to law enforcement. Tr. 70-71, 80-81, 265, 414. The ATF ultimately attributed

more than 30 home invasions to the gang, many of which had not been reported to the police. Tr. 415, 417. Petitioner persuaded Fitzgerald to let petitioner join in several of the home-invasion robberies, J.A. 72a, two of which are relevant here.

a. On the evening of August 27, 2009, Fitzgerald, petitioner, and two other members of the gang targeted the home of Joshua Whorley. J.A. 73a. Fitzgerald had learned from a source that Whorley was a drug dealer who sold "exotic," "high grade" marijuana, and he conveyed this information to petitioner and the rest of the crew. *Ibid.*; see Tr. 89-90, 112-113, 266, 364. The men headed to Whorley's home in an attempt to steal "[m]arijuana and money." Tr. 102; see J.A. 73a; Tr. 286, 299, 396.

Armed with Fitzgerald's gun, petitioner kicked in the door. Tr. 90-93, 296. As the men ransacked Whorley's home, petitioner and Fitzgerald demanded, "Where is your money and where is your weed at?" Tr. 93, 212-213; see J.A. 73a; Tr. 178, 223. The gang was unable to locate substantial amounts of marijuana or cash, however, and ultimately stole Whorley's cell phone and $40, jewelry, and a cell phone belonging to Whorley's girlfriend. J.A. 73a; Tr. 181-182, 213, 218-219, 303. In addition, the gang stole a single marijuana cigarette. J.A. 73a; see Tr. 194, 213.

The August 27 robbery was the third time that the residence had been targeted and the second time within a year. J.A. 73a; Tr. 170-172, 187, 202-204. Whorley admitted that he had sold marijuana in the past and, although he denied dealing drugs at the time of the August 27 home invasion, Tr. 173, a Roanoke detective suspected that Whorley was a dealer be-

cause such dealers were repeatedly targeted for robbery. Tr. 472-473; see Tr. 72.

b. On the evening of October 21, 2009, Fitzgerald, petitioner, and another member of the gang targeted the home of William "W.T." Lynch. J.A. 73a-74a. Fitzgerald had obtained information from a reliable source that Lynch was a marijuana dealer and that the source had previously robbed Lynch of 20 pounds of marijuana in front of Lynch's home. *Ibid.*; Tr. 353-355, 364, 370. Fitzgerald conveyed this information to petitioner and Dejuan Lemons and told them that "there was supposed to be marijuana" at the house. Tr. 367-368, 420-421. Petitioner later admitted to a federal agent that he expected to obtain "pounds of weed" from the robbery. Tr. 420; see Tr. 354. The victim, Lynch, also later admitted to the police that he was a marijuana dealer but asked that police not tell his wife about his "drug-dealing activities." Tr. 443; see Tr. 436.

When the three-man crew entered the Lynch home, they found Lynch, his wife, and two children in the living room. Tr. 357-358, 365, 369. Lynch's wife ran out of the room, Lemons laid chase, and petitioner held Lynch and the children at gunpoint. Tr. 357-358, 365-366, 369. When Fitzgerald demanded that Lynch tell him "where the weed at," Lynch told him that a "guy named Mark ha[d] the weed" and that Lynch did not. Tr. 359. Petitioner and Lemons ransacked the house but failed to find drugs or money. Tr. 361, 366, 368. The crew left with only Lynch's cell phone. J.A. 74a; Tr. 361, 377.

2. In 2012, a federal grand jury returned a superseding indictment (J.A. 11a-14a) charging petitioner, as relevant here, with two counts of robbery and at-

tempted robbery "affect[ing] commerce, and the movement of articles and commodities in such commerce," by attempting to take or obtain "marijuana and drug proceeds" from his victims, in violation of the Hobbs Act, 18 U.S.C. 1951(a) and 2. J.A. 12a-13a. In late October 2012, petitioner's first trial resulted in a mistrial after the jury was unable to reach a unanimous verdict. J.A. 74a; D. Ct. Doc. 54 (Oct. 24, 2012). Petitioner's retrial was scheduled for January 2013. D. Ct. Doc. 56 (Oct. 30, 2012); see J.A. 75a.

One of the government's pretrial motions sought to prohibit petitioner from presenting evidence supporting the argument that "robbery of a drug dealer selling * * * 'in-state' marijuana would not be a violation of the Hobbs Act." J.A. 15a. The government argued that even if a drug dealer victimized by such a robbery trades "in marijuana grown in Virginia," the robbery will, "as a matter of law, affect[] interstate commerce" because drug dealing in marijuana "'is an inherently economic enterprise that affects interstate commerce.'" J.A. 15a-17a (quoting *United States* v. *Williams*, 342 F.3d 350, 355 (4th Cir. 2003), cert. denied, 540 U.S. 1169 (2004)). The district court granted the motion. J.A. 60a; see J.A. 44a-46a.

At trial, petitioner moved for a judgment of acquittal at the conclusion of the government's case-in-chief, and renewed that motion at the close of evidence, based on his contention that "no evidence" had been admitted to support the affect-on-commerce element of a Hobbs Act offense. Tr. 445-447, 532-533; cf. Fed. R. Crim. P. 29(a). The district court denied the motions, explaining that precedential decisions established "the legal proposition" that such "drug dealing impacts interstate commerce" and that the court "in-

tend[ed] to give that instruction to the jury as a matter of law." Tr. 446. Proof of a "theft of drugs" or "an attempt to steal [such] drugs," the court explained, is "sufficient to satisfy the [Hobbs Act's] interstate commerce requirement." Tr. 532-533.

The district court subsequently instructed the jury on the elements of a Hobbs Act offense. J.A. 61a-66a (written instructions provided to the jury); see Tr. 602-608 (oral instructions). As relevant here, the court instructed that the government must not only establish the robbery element of the offense but must also establish beyond a reasonable doubt that, "as a result of [petitioner's] actions, interstate commerce, or an item moving in interstate commerce, was delayed, obstructed, or affected in any way or degree." J.A. 63a. "The term 'commerce,'" the court continued, "means any commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction." J.A. 65a.

The district court further instructed that the government could satisfy its burden of proving "an obstruction, delay, or effect on interstate commerce" by proving that petitioner "reduced the movement of articles and commodities in interstate commerce, in this case, illegal drugs and drug proceeds, or attempted to do so, by the robberies charged." J.A. 63a. That element, the court explained, "may be proven by evidence that [petitioner's] actions were likely to affect

interstate commerce, even though the actual impact on commerce is small." J.A. 63a-64a.

The jury found petitioner guilty on both Hobbs Act charges and on one firearms count. J.A. 67a-69a.

3. The court of appeals affirmed. J.A. 71a-86a. After noting that petitioner's appeal "rest[ed] solely on the sufficiency of the evidence" and not on the district court's jury instructions, J.A. 82a, the court held that the evidence was sufficient to establish the jurisdictional element of the Hobbs Act. J.A. 76a-86a.

The court of appeals explained that the Hobbs Act utilizes "'all the constitutional power Congress has to punish interference with interstate commerce'" and that the Act's jurisdictional element is satisfied by a *de minimis* effect on commerce. J.A. 76a-77a (quoting *Stirone* v. *United States*, 361 U.S. 212, 215 (1960)). Moreover, the court continued, such an effect can be established by showing that "the 'relevant class of acts'" in the "aggregate" has "a measureable impact on interstate commerce." J.A. 77a-78a (citation omitted).

This Court's decision in *Raich*, the court of appeals recognized, established that Congress has authority under the Commerce Clause to regulate the entire "national market for marijuana," including the "intrastate marijuana market because of its aggregate impact on interstate commerce." J.A. 77a, 80a. Thus, the court observed, because Congress has jurisdiction over "marijuana that is grown, processed, and sold entirely within a single state" and because the Hobbs Act's definition of "commerce" in 18 U.S.C. 1951(b)(3), encompasses such "commerce over which the United States has jurisdiction," the Act logically applies to "robberies of drug dealers" with no "marijuana excep-

tion." J.A. 79a-80a (citation omitted). The court determined that robberies of drug dealers fall within the Hobbs Act's prohibition because "[d]rug dealing is a commercial enterprise" and robberies that "threaten that enterprise" affect "a trade that plainly is both economic and interstate in character." J.A. 80a (citation omitted).

The court of appeals added that, "[b]ecause drug dealing in the aggregate necessarily affects interstate commerce, the government was simply required to prove that [petitioner] depleted or attempted to deplete the assets of [a drug-dealer's] operation." J.A. 82a. The government satisfied that burden, the court explained, because the evidence was sufficient to show that "Whorley was a drug dealer" and that petitioner "depleted or attempted to deplete his assets" and "attempted to steal drugs and drug proceeds" during the robbery. J.A. 82a-83a (emphasis omitted). The court similarly concluded that the evidence was sufficient for the jury to find that "Lynch was a drug dealer" and that petitioner "attempted to deprive Lynch's operation of both drugs and drug proceeds" by robbery. J.A. 83a-84a. The evidence was also sufficient to show that "[petitioner] intentionally targeted a business engaged in interstate commerce" and "rob[bed] [each] victim in the belief that he [would] recover the proceeds of [the] enterprise." J.A. 84a. Given petitioner's intentional targeting, the court concluded, petitioner could "not fortuitously escape prosecution under the Hobbs Act" simply "because his target did not possess" at the time of the robbery the property that petitioner attempted to steal. J.A. 84a-85a.

SUMMARY OF ARGUMENT

The evidence of petitioner's "robbery or attempted robbery of a [marijuana] dealer" of his supply of marijuana was sufficient to "prov[e] beyond a reasonable doubt the interstate commerce element" of the Hobbs Act counts on which petitioner was convicted. See Pet. i. This is so for two independent reasons.

First, as the court of appeals concluded, evidence that petitioner robbed or attempted to rob marijuana dealers of marijuana is, standing alone, sufficient evidence from which a rational jury could find the jurisdictional element satisfied. The Hobbs Act covers all robberies that affect, "in any way or degree," any commerce over which the United States has jurisdiction. 18 U.S.C. 1951(a) and (b)(3). That expansive language exercises the full extent of Congress's Commerce Clause authority. In establishing the jurisdictional element, the government can rely on case-specific proof of an effect on interstate commerce. But it can also rely on proof that the robbery affects a class of activities that bears the requisite relation to interstate commerce, even if the activity in question is by itself entirely local. See *Russell* v. *United States*, 471 U.S. 858, 859 n.4 (1985).

Here, the class of activities involving marijuana distribution, even involving intrastate production, possession, and sale, is "commerce over which the United States has jurisdiction." 18 U.S.C. 1951(b)(3). Congress exerted such authority over all marijuana distribution in the Controlled Substances Act, and this Court confirmed that Congress's regulatory power over interstate commerce extends to the regulation of local, intrastate production and distribution of marijuana. *Gonzales* v. *Raich*, 545 U.S. 1 (2005). According-

ly, all domestic trade in marijuana, even trade occurring wholly within a single State, constitutes, as a matter of law, "commerce over which the United States has jurisdiction," 18 U.S.C. 1951(b)(3). In light of that principle, the court of appeals correctly held that the evidence of petitioner's attempts to rob marijuana dealers of marijuana is thus sufficient to show that the attempted robberies would "in any way or degree" affect "commerce over which the United States has jurisdiction" (the marijuana trade) or the "movement of any article or commodity" (marijuana) in "commerce over which the United States has jurisdiction," 18 U.S.C. 1951(a) and (b)(3).

Second, even without regard to that theory, the trial evidence showed that petitioner specifically targeted marijuana dealers who traded in "exotic" marijuana and wholesale quantities of the drug. Based on the evidence as a whole, a reasonable jury could infer that the attempted robberies (if successful) would have affected "the movement of [marijuana] in commerce" across State lines or the interstate "commerce" conducted by the targeted dealers, 18 U.S.C. 1951(a).

ARGUMENT

THE TRIAL EVIDENCE IS SUFFICIENT TO SHOW THAT PETITIONER'S ROBBERIES OF MARIJUANA DEALERS AFFECTED COMMERCE OVER WHICH THE UNITED STATES HAS JURISDICTION

The Hobbs Act provides that "[w]hoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do" is guilty of an offense. 18 U.S.C. 1951(a). That text identifies the "two essential elements" of a Hobbs Act violation: a jurisdictional

"commerce" element and a non-jurisdictional element based on an act of robbery or extortion. See *Stirone* v. *United States*, 361 U.S. 212, 218 (1960). The statutory text, in turn, shows that the Act's jurisdictional element embodies the full scope of Congress's constitutional authority over commerce. That power extends to even purely intrastate activity when that activity is a commercial one that falls within a class of activities that, in the aggregate, can reasonably be expected to have a substantial effect on interstate commerce.

Here, the evidence that petitioner robbed or attempted to rob persons engaged in, or believed to be engaged in, marijuana dealing satisfied that jurisdictional element. Alternatively, the jury could have rationally concluded that the marijuana dealers targeted for robbery were, or were believed to be, engaged in trade involving out-of-state marijuana. On either theory, the evidence was sufficient to satisfy the Hobbs Act's jurisdictional element.

A. The Hobbs Act's Jurisdictional Element Employs The Full Scope of Congress's Authority Over Commerce

This Court has long recognized that the "broad" language of the Hobbs Act "use[s] all the constitutional power Congress has to punish interference with interstate commerce by * * * robbery." *Stirone*, 361 U.S. at 215.

1. The statutory text reflects Congress's intent to exercise all of its constitutional power under the Commerce Clause

Three features of the Hobbs Act's broad text demonstrate that the Act exercises the full scope of

Congress's Commerce Clause power to regulate robbery and extortion.

First, the Hobbs Act extends both to activities "affect[ing] commerce" as well as those affecting the movement of an article or commodity "in commerce." 18 U.S.C. 1951(a). The phrase "affecting commerce" is a "[term] of art that ordinarily signal[s] the broadest permissible exercise of Congress' Commerce Clause power." *Citizens Bank* v. *Alafabco, Inc.*, 539 U.S. 52, 56 (2003) (per curiam); see *Allied-Bruce Terminix Cos.* v. *Dobson*, 513 U.S. 265, 273 (1995). The phrase "in commerce" is also a "[term] of art," which describes more narrowly items actually in "the flow of interstate commerce." *Allied-Bruce Terminix Cos.*, 513 U.S. at 273 (emphasis and citation omitted); see *Gulf Oil Corp.* v. *Copp Paving Co.*, 419 U.S. 186, 194-195 (1974). "Congress is aware of the 'distinction between legislation limited to activities 'in commerce' and an assertion of its full Commerce Clause power so as to cover all activity substantially affecting interstate commerce." *Russell* v. *United States*, 471 U.S. 858, 859 n.4 (1985) (citation omitted). By employing both formulations, Congress expressed its intent to allow the Hobbs Act's jurisdictional inquiry to be satisfied under either theory. Cf. *McLain* v. *Real Estate Bd. of New Orleans, Inc.*, 444 U.S. 232, 242 (1980) (explaining that "the jurisdictional requirement of the Sherman Act may be satisfied under either the 'in commerce' or the 'effect on commerce' theory").

Second, Congress emphasized that the jurisdictional inquiry is satisfied by activity that "in *any* way or degree" affects commerce or the movement of items in commerce. 18 U.S.C. 1951(a) (emphasis added). "These words do not lend themselves to restric-

tive interpretation." *United States* v. *Culbert*, 435 U.S. 371, 373 (1978) (interpreting Section 1951(a)). "Read naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'" *United States* v. *Gonzales*, 520 U.S. 1, 5 (1997) (quoting *Webster's Third New International Dictionary* 97 (1976)). Section 1951(a) accordingly confirms that any type of effect on commerce, regardless of the "degree" or magnitude of that effect, satisfies the Act's jurisdictional element.

Finally, Congress defined the term "commerce" broadly. The Act's definition of the term employs a geographic understanding of "commerce" by encompassing "commerce within the District of Columbia, or any Territory or Possession of the United States"; "all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof"; and "all commerce between points within the same State through any place outside such State." 18 U.S.C. 1951(b)(3). In addition, the Act adopts an expansive legally focused understanding of "commerce" by including within the term's scope "all other commerce over which the United States has jurisdiction." *Ibid.* As a result, the Act's jurisdictional requirement can be satisfied by (1) an effect on "commerce" in either the geographic or the jurisdictional sense or (2) an effect on the movement of an item in "commerce" so defined.[1]

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[1] The Hobbs Act's jurisdictional element evolved from a materially similar jurisdictional provision in the Anti-Racketeering Act of 1934, ch. 569, 48 Stat. 979, to which Congress enacted the Hobbs Act as an amendment. See 60 Stat. 420 (amending 1934 Act by adopting text of the Hobbs Act); *Callanan* v. *United States*, 364 U.S. 587, 590-591 (1961). The 1934 Act applied to activity that "in

This Court has thus repeatedly concluded that the Hobbs Act announces Congress's "purpose to use all the constitutional power [it] has to punish interference with interstate commerce by extortion [or] robbery." *Culbert*, 435 U.S. at 373 (quoting *Stirone*, 361 U.S. at 215); see *Scheidler* v. *National Org. for Women, Inc.*, 537 U.S. 393, 408-409 (2003); *Evans* v. *United States*, 504 U.S. 255, 263 n.12 (1992). Unlike the substantive element of a Hobbs Act offense, for which the rule of lenity may be relevant when confronting grievous statutory ambiguity, see *Scheidler*, 537 U.S. at 408 (citing *United States* v. *Enmons*, 410 U.S. 396, 411 (1973)), the jurisdictional element of the Act is expressed in expansive statutory language that unambiguously applies the "full extent of [Congress's] commerce power" to prohibit extortion and robbery. *Ibid.*

2. The Commerce Clause power extends to intrastate activities that fall within a class of economic activities having, in the aggregate, a substantial effect on interstate commerce

The Commerce Clause authorizes Congress to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S.

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any way or in any degree affect[ed] trade or commerce" or any article or commodity moving therein, and defined "trade or commerce" to include geographically defined commerce and "all other trade or commerce over which the United States has constitutional jurisdiction." §§ 1-2, 48 Stat. 979-980. Like their Hobbs Act counterparts, those provisions were specifically "designed * * * to extend Federal jurisdiction over all restraints of any commerce within the scope of the Federal Government's constitutional powers." S. Rep. No. 532, 73d Cong., 2d Sess. 1 (1934); see 78 Cong. Rec. 5734-5735 (1934); see also *Callanan*, 364 U.S. at 594 n.8.

Const. Art. I, § 8, Cl. 3. "[I]t is now well established that Congress has broad authority under th[at] Clause." *National Fed'n of Indep. Bus.* v. *Sebelius*, 132 S. Ct. 2566, 2585 (2012) (opinion of Roberts, C.J.) (*NFIB*). Among other things, "the Commerce Clause has * * * long been interpreted" to grant Congress authority "extend[ing] beyond activities actually *in* interstate commerce to reach other activities that, while wholly local in nature, nevertheless substantially *affect* interstate commerce." *McLain*, 444 U.S. at 241. This Court's precedents accordingly establish that, "under its commerce power," Congress may regulate the "channels of interstate commerce," "instrumentalities of interstate commerce" and "persons or things in interstate commerce," and "those activities that substantially affect interstate commerce." *United States* v. *Morrison*, 529 U.S. 598, 608-609 (2000) (quoting *United States* v. *Lopez*, 514 U.S. 549, 558-559 (1995)); see *United States* v. *Robertson*, 514 U.S. 669, 671 (1995) (per curiam) (explaining that "[t]he 'affecting commerce' test" recognizes "Congress' power over purely intrastate commercial activities that nonetheless have substantial interstate effects"); see also, *e.g.*, *Gonzales* v. *Raich*, 545 U.S. 1, 16-17 (2005); *Perez* v. *United States*, 402 U.S. 146, 150 (1971).

Congress's power to regulate local activity having a "substantial affect" on commerce, moreover, "is not limited to regulation of an activity that by itself substantially affects interstate commerce"; it "also extends to activities that do so only when aggregated with similar activities of others." *NFIB*, 132 S. Ct. at 2586 (opinion of Roberts, C.J.); see, *e.g.*, *Perez*, 402 U.S. at 152-155, 157 (holding that Congress's Commerce Clause authority extends to "purely intrastate"

loansharking because extortionate credit transactions are within a "class of activities" that substantially affects interstate commerce by "syphon[ing] funds from numerous localities") (emphasis omitted). As a result, "Congress' Commerce Clause power 'may be exercised in individual cases without showing any specific effect upon interstate commerce'" so long as "in the aggregate the economic activity in question would represent 'a general practice . . . subject to federal control.' Only that general practice need bear on interstate commerce in a substantial way," *Citizens Bank*, 539 U.S. at 56-57 (citations omitted), and, when the class of activity has such an effect, "courts have no power 'to excise, as trivial, individual instances' of the class," *Perez*, 402 U.S. at 154 (citation omitted). In other words, "the *de minimis* character of individual instances * * * is of no consequence" under this Court's precedents "firmly establish[ing] Congress' power to regulate purely local activities that are part of an economic 'class of activities' that have a substantial effect on interstate commerce." *Raich*, 545 U.S. at 17 (citation omitted).

That aggregation principle applies in circumstances in which the regulated activity involves "some sort of economic endeavor." *Morrison*, 529 U.S. at 610-611. In *Raich*, for instance, the Court held that "Congress' power to regulate interstate markets * * * encompasses the portions of those markets that are supplied with drugs produced and consumed locally." 545 U.S. at 7-9. The Court explained that the activity "regulated by the CSA [is] quintessentially economic" because it concerns the "production, distribution, and consumption of commodities for which there is an established, and lucrative, interstate market." *Id.* at

25-26. Such regulation, the Court concluded, fell within "Congress' regulatory jurisdiction," *id.* at 27 n.37, because marijuana is "a fungible commodity for which there is an established, albeit illegal, interstate market," *id.* at 18, and because Congress could reasonably conclude that the "aggregate" effect of "leaving home-consumed marijuana outside federal control would * * * affect price and market conditions" and have "a substantial effect on supply and demand in the national market for that commodity," *id.* at 19. *Raich* explained that "[o]ne need not have a degree in economics" to recognize that exempting marijuana "locally cultivated for personal use" from regulation would have such aggregate effect because, "under any commonsense appraisal of the probable consequences," permitting such use would likely have a "substantial impact on the interstate market for this extraordinarily popular substance." *Id.* at 28-29. That conclusion, the Court noted, was not merely "rational, but 'visible to the naked eye.'" *Ibid.* (quoting *Lopez*, 514 U.S. at 563).[2]

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[2] This Court has declined to "adopt a categorical rule against aggregating the effects of any noneconomic activity," *Morrison*, 529 U.S. at 613, but has twice held, in examining particular statutes regulating conduct having no relation to economic activity and lacking a jurisdictional element requiring a connection to commerce, that the requisite effect on interstate commerce should be analyzed without such aggregation. See *id.* at 605-606, 617 (holding that Congress's provision of a civil remedy for certain victims of crimes of violence motivated by gender exceeded its commerce power; concluding that Congress could not in that context "regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce"); *Lopez*, 514 U.S. at 561 (concluding that an effect on interstate commerce could not be shown by aggregating the effects of the activity of pos-

Raich's mode of analysis reflects this Court's use of practical economics based on common sense and logic to evaluate a regulated activity's likely effect on interstate commerce. See also, *e.g.*, *Citizens Bank*, 539 U.S. at 58 (concluding that "the broad impact of commercial lending on the national economy" is "evident" with "[n]o elaborate explanation" required); *Summit Health, Ltd.* v. *Pinhas*, 500 U.S. 322, 331 (1991) (concluding that "'as a matter of practical economics,'" "a reduction in the provision of opthalmological services in the Los Angeles market" would occur if an alleged antitrust conspiracy were successful) (quoting *McLain*, 444 U.S. at 246); *Russell*, 471 U.S. at 862 (upholding prosecution under federal arson statute for setting fire to a local rental property because "the local rental of an apartment unit is merely an element of a much broader commercial market in rental properties").

Hobbs Act decisions in the courts of appeals apply those principles. In addressing robberies targeting persons engaged in commercial activity, the courts of appeals have consistently concluded that it is appro-

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sessing a handgun within 1000 feet of a school, where that activity did not "arise out of" or have any "connection with a commercial transaction"). Those statutes are unlike the Hobbs Act, which contains an explicit jurisdictional element requiring an effect on commerce and addresses a form of criminal activity that is inherently economic. See, *e.g.*, *United States* v. *Walker*, 657 F.3d 160, 179 (3d Cir. 2011) (distinguishing *Lopez* and *Morrison* on those bases), cert. denied, 132 S. Ct. 1122 (2012), and 134 S. Ct. 120 (2013); *United States* v. *Malone*, 222 F.3d 1286, 1295 (10th Cir.) (concluding that the Hobbs Act is distinguishable from the statutes at issue in *Lopez* and *Morrison* because "the Hobbs Act regulates economic activity" and "contains an explicit and expansive jurisdictional element"), cert. denied, 531 U.S. 1028 (2000).

priate to consider the aggregate effect of such robberies as a class on interstate commerce because such a "[r]obbery, even though accompanied by actual or threatened physical harm, is undeniably an economic crime that involves the involuntary transfer of economically valuable assets." *United States* v. *Gray*, 260 F.3d 1267, 1274 (11th Cir. 2001) (emphasis omitted) (robbery of restaurant), cert. denied, 536 U.S. 963 (2002); see, *e.g.*, *United States* v. *Walker*, 657 F.3d 160, 179 (3d Cir. 2011) (robbery of drug dealers), cert. denied, 132 S. Ct. 1122 (2012), and 134 S. Ct. 120 (2013); *United States* v. *Morris*, 247 F.3d 1080, 1086-1087 (10th Cir. 2001) (robbery of grocery store). Likewise, no court of appeals requires the government to prove that the specific Hobbs Act offense at issue in a prosecution has "substantial" effect on interstate commerce. The courts instead uniformly hold that, in any "individual case, proof of a *de minimis* effect on interstate commerce is all that is required." *United States* v. *Clausen*, 328 F.3d 708, 711 (3d Cir.) (robberies of multiple businesses), cert. denied, 540 U.S. 900 (2003).[3]

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[3] Accord *United States* v. *Tillery*, 702 F.3d 170, 174 (4th Cir. 2012) (robbery of dry cleaner), cert. denied, 133 S. Ct. 2369 (2013); *United States* v. *Carr*, 652 F.3d 811, 813 (7th Cir.) (robbery of convenience store), cert. denied, 132 S. Ct. 827 (2011); *United States* v. *Baylor*, 517 F.3d 899, 901 (6th Cir.) (robbery of restaurant), cert. denied, 554 U.S. 920 (2008); *United States* v. *Lynch*, 437 F.3d 902, 908-909 (9th Cir.) (en banc) (per curiam) (robbery of non-drug assets of drug dealer), cert. denied, 549 U.S. 836 (2006); *United States* v. *Capozzi*, 347 F.3d 327, 335-337 (1st Cir. 2003) (extortion of auto dealer), cert. denied, 540 U.S. 1168 (2004); *United States* v. *Silverio*, 335 F.3d 183, 186-187 (2d Cir. 2003) (per curiam) (robbery of assets of medical practice); *United States* v. *Williams*, 308 F.3d 833, 838-839 (8th Cir. 2002) (robbery of cab

Petitioner himself "does not contest the long-established rule" that a Hobbs Act prosecution need only show that the charged conduct has a "*de minimis*" "connection to interstate commerce." Br. 27. Nor does he challenge the use of aggregation analysis under the Hobbs Act. Accordingly, he concedes that "the nexus between the challenged conduct—in this case, the robberies—and interstate commerce 'may be *de minimis.*'" Br. 21-22 (citation omitted).

B. Proof Of Petitioner's Robbery Of A Suspected Marijuana Dealer Is Sufficient To Show The Requisite Effect On "Commerce Over Which The United States Has Jurisdiction"

Because the Hobbs Act's reach is "coextensive with that of the Commerce Clause," *Walker*, 657 F.3d at 179 (citation omitted), the government may satisfy the Act's jurisdictional element in a variety of ways. For example, it may present case-specific proof of a robbery's effect on "commerce" or "the movement of any article or commodity in commerce," 18 U.S.C. 1951(a), by establishing that a robbery interfered with a commercial establishment's purchase of goods or services from out of state. A *de minimis* effect of that character brings the robbery within the scope of the Act. See pp. 17-18, 21 & n.3, *supra*.

But because the Act's jurisdictional element is also satisfied by showing an effect on any other "commerce over which the United States has jurisdiction," 18 U.S.C. 1951(b)(3), the government can carry its bur-

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driver); *Gray*, 260 F.3d at 1275-1276; *Malone*, 222 F.3d at 1294-1295 (10th Cir.) (robberies of restaurant and a business); *United States* v. *Hebert*, 131 F.3d 514, 521-524 (5th Cir. 1997) (per curiam) (robberies of restaurant and liquor store), cert. denied, 523 U.S. 1101 (1998).

den by presenting proof that the charged robbery had the requisite effect on a particular *type* of economic activity over which, *as a matter of law*, the United States has regulatory "jurisdiction." In such instances, federal regulatory jurisdiction exists over the relevant class of economic activities, and individual robberies within that class are encompassed within the Hobbs Act.

1. Although the Hobbs Act asks whether a particular robbery had the requisite effect on commerce, the government may satisfy that showing by demonstrating that the robbery falls within a class subject to congressional regulation even when the particular conduct is local. For instance, in *Russell*, this Court considered whether the arson of a two-unit apartment building in Chicago, Illinois, violated 18 U.S.C. 844(i). See *Russell*, 471 U.S. at 858-859. That criminal prohibition applies to arson of property "used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce," 18 U.S.C. 844(i), and thus "expresses an intent by Congress to exercise its full power under the Commerce Clause." 471 U.S. at 859. Section 844(i) does not itself define particular classes of property that satisfy that standard. The Court nevertheless unanimously concluded in *Russell* that arson of rental property has the requisite connection to interstate commerce because "the local rental of an apartment unit is merely an element of a much broader commercial market in rental properties." *Id.* at 862. "The congressional power to regulate the class of activities that constitute the rental market for real

estate," the Court held, "includes the power to regulate individual activity within that class." *Ibid.*[4]

Similarly, the Sherman Act, 15 U.S.C. 1 *et seq.*, prohibits contracts or conspiracies "in restraint of trade or commerce among the several States, or with foreign nations," 15 U.S.C. 1, and has long been held to "exercise all the [constitutional] power [Congress] possessed," *Summit Health*, 500 U.S. at 329 n.10 (citation omitted). The Sherman Act does not delineate particular commercial activities over which Congress has jurisdiction even when the conduct in question takes place within a single State. Nevertheless, this Court has long recognized that the Sherman Act reaches even wholly local activity that will substantially affect interstate commerce. See *McLain*, 444 U.S. at 241 (citing *Wickard* v. *Filburn*, 317 U.S. 111 (1942), to explain that Congress's commerce power extends to "activities that, while wholly local in nature, nevertheless substantially affect interstate commerce" and stating that this Court has "often noted the correspondingly broad reach of the Sherman Act" (emphasis omitted)).

2. Petitioner's robberies of local marijuana dealers belong to a class of activities that bears the requisite substantial effect on interstate commerce. Congress exercised the power to regulate all marijuana traffick-

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[4] In *Jones* v. *United States*, 529 U.S. 848 (2000), the Court clarified that Section 844(i) requires a showing that the property at issue be actively used for commercial purposes. *Id.* at 855-856 (owner-occupied property is not covered because it is not actively used in an activity affecting commerce). But the Court did not question *Russell*'s holding that arson of rental property in a local market satisfies the statutory and constitutional test because it belongs to a broader commercial market. *Id.* at 856.

ing in the Controlled Substances Act, and *Raich* confirmed that Congress's authority over commerce includes the power to regulate the wholly intrastate production and distribution of marijuana. Accordingly, all domestic trade in marijuana by drug dealers, even trade occurring entirely within a single State, is "commerce over which the United States has jurisdiction," 18 U.S.C. 1951(b)(3), as a matter of law. The United States may therefore prove an effect on "commerce over which the United States has jurisdiction" by proving that the defendant robbed (or attempted to rob) a marijuana dealer of marijuana.

a. Congress enacted the CSA to "control the legitimate and illegitimate traffic in controlled substances." *Raich*, 545 U.S. at 12. In so doing, Congress specifically found that controlled substances manufactured and distributed "intrastate cannot be differentiated from controlled substances manufactured and distributed interstate" and that the "[l]ocal distribution and possession of controlled substances contribute to swelling the interstate traffic in such substances." 21 U.S.C. 801(4) and (5). Congress accordingly exercised regulatory authority over "the intrastate incidents of the traffic in controlled substances." See 21 U.S.C. 801(6). This Court's decision in *Raich* confirms that "Congress' regulatory jurisdiction" (545 U.S. at 27 n.37) over interstate commerce includes the power to regulate "the intrastate manufacture and possession of marijuana" for personal medical use under the line of Commerce Clause precedents governing "the power to regulate activities that substantially affect interstate commerce." *Id.* at 15, 17.

In light of that holding, all of the marijuana trade, even the portions of which that occur entirely within

one State, is "commerce over which the United States has jurisdiction" for purposes of the Hobbs Act, 18 U.S.C. 1951(b)(3). That is because it is now beyond question that local marijuana production is within Congress's regulatory authority, and this Court has repeatedly recognized that Section 1951(b)(3)'s definition of "commerce" is coextensive with the full reach of congressional power over commerce. *Scheidler*, 537 U.S. at 408; *Culbert*, 435 U.S. at 373; *Stirone*, 361 U.S. at 215.

b. Because the marijuana trade is "commerce over which the United States has jurisdiction," 18 U.S.C. 1951(b)(3), it follows that the robbery of a marijuana dealer of marijuana necessarily will "in any way or degree" "affect[] [such] commerce" (namely, the marijuana trade) or "the movement of an[] article or commodity in [such] commerce," 18 U.S.C. 1951(a). Marijuana dealers engage in the quintessentially commercial activity of selling a product, and robberies of their marijuana as a matter of practical economics will have a non-*de minimis* effect on interstate commerce. Under "any commonsense appraisal," see *Raich*, 545 U.S. at 29, of the consequence of a theft of that commodity, a realistic probability exists that the victim-dealer would enter the interstate market to replenish his stolen goods; that the dealer's customers would go to an alternative source trading in out-of-state marijuana; that other interstate traffickers would enter the local market to replace the victim dealer; or that the stolen commodity itself would enter in the larger interstate market.[5] Similarly, robberies in which the

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[5] These effects need not be certain to fall within the Act. *United States* v. *Staszcuk*, 517 F.2d 53, 60 (7th Cir.) (en banc) (Stevens, J.) ("realistic probability" of an effect on commerce, not "actual ef-

inventory of marijuana dealers is stolen will directly affect the "movement of an[] article or commodity"—the stolen marijuana—in "commerce over which the United States has jurisdiction." It follows that the Hobbs Act's jurisdictional element can be satisfied by proving that the defendant robbed a marijuana dealer of his marijuana.[6]

The same holds true in the context of an attempted robbery of a marijuana dealer for marijuana. Because an attempted Hobbs Act robbery is an inchoate crime, "the defendant's conduct should be measured according to the circumstances as he believe[d] them to be, rather than the circumstances as they may have existed in fact." Model Penal Code § 5.01, cmt. 3, at 307 (1985) (quoted in *United States* v. *Williams*, 553 U.S. 285, 300 (2008)). Thus, to prove such an attempt, "the government need not prove that the defendant's ac-

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fect," is the test), cert. denied, 423 U.S. 837 (1975); accord, *e.g.* *United States* v. *Campbell*, 770 F.3d 556, 573 (7th Cir. 2014), cert. denied, 135 S. Ct. 1724 (2015); *United States* v. *Watkins*, 509 F.3d 277, 281 (6th Cir. 2007).

[6] As the court of appeals recognized, this does not imply that all robberies of any individuals who possess marijuana in a private, non-commercial context fall within the Hobbs Act. J.A. 86a. Lower courts have found that such individual robberies have a more speculative and attenuated connection to interstate commerce than robberies targeted at business assets and in particular contexts thus fall outside of the Hobbs Act. See, *e.g.*, *United States* v. *Wang*, 222 F.3d 234, 240 (6th Cir. 2000); *United States* v. *Collins*, 40 F.3d 95, 100 (5th Cir. 1994), cert. denied, 514 U.S. 1121 (1995). But those cases differ from ones like this one, involving the targeting of a business participating in a market over which Congress has jurisdiction. Cf. *United States* v. *Powell*, 693 F.3d 398, 403-404 (3d Cir. 2012) (distinguishing individual-robbery cases from robberies targeting of assets of a business engaged in interstate commerce), cert. denied, 133 S. Ct. 901 (2013).

tions actually obstructed, delayed, or affected commerce"; it need only show "a 'realistic probability' of that result" by showing that the defendant "targeted" the drug dealer for robbery. *United States* v. *Muratovic*, 719 F.3d 809, 813-814 (7th Cir. 2013) (citation omitted). The "[p]otential impact" of the attempted offense is then "measured at the time of the attempt * * * based on the assumed success of the intended scheme." *United States* v. *Le*, 256 F.3d 1229, 1232-1233 (11th Cir. 2001) (citation omitted), cert. denied, 534 U.S. 1145 (2002).

In this case, the evidence was more than sufficient to show that petitioner attempted to rob marijuana dealers and steal their marijuana and drug proceeds. See pp. 5-6, *supra*. As the court of appeals explained, petitioner cannot "fortuitously escape prosecution under the Hobbs Act" simply "because his target did not possess" the marijuana that petitioner intended to steal. J.A. 84a-85a.

3. a. Petitioner argues (Br. 19-21) that the jury must find "every element of the offense charged" beyond a reasonable doubt and that the court of appeals "impermissibly relieve[d] the Government of its burden" of proving the Hobbs Act's jurisdictional element to the jury by ruling that, as a matter of law, proof of petitioner's attempted "robbery of suspected marijuana dealers" was sufficient because "all drug dealing affects commerce for purposes of the Hobbs Act." That is incorrect.

The government does not dispute that "[t]he Constitution gives a criminal defendant the right to demand that a jury find him guilty of all the elements of the crime with which he is charged." *United States* v. *Gaudin*, 515 U.S. 506, 511 (1995). Nor does the gov-

ernment dispute that the "jury's constitutional responsibility is not merely to determine the facts" but also "to apply the law to those facts and draw the ultimate conclusion of guilt or innocence." *Id.* at 514. A jury, however, does not have "the power to determine * * * pure questions of law in a criminal case." *Id.* at 513 (emphasis omitted). Instead, "the judge must be permitted to instruct the jury on the law and to insist that the jury follow his instructions." *Ibid.* (citing *Sparf* v. *United States*, 156 U.S. 51, 105-106 (1895)). The jury then determines "whether the evidence established the [defendant's] guilt or innocence" by "applying to the facts the principles of law announced by the court." *Sparf*, 156 U.S. at 106.

In this case, proof of the Hobbs Act's jurisdictional element is established by two propositions: (1) petitioner attempted to rob a drug dealer of his supply of marijuana and (2) the marijuana trade, even those portions of it that occur wholly within one State, constitutes "commerce over which the United States has jurisdiction," 18 U.S.C. 1951(b)(3). The first proposition is a question of fact the government sufficiently established at trial. The second is a pure question of law concerning the scope of the United States' "jurisdiction" and, as explained above, the answer to that legal question follows from the Court's analysis in *Raich*.

A judge may thus properly instruct the jury that, as a matter of law, the marijuana trade is "commerce over which the United States has jurisdiction," 18 U.S.C. 1951(b)(3), and "insist that the jury follow [that] instruction[]," *Gaudin*, 515 U.S. at 513, when determining whether the government established the Hobbs Act's jurisdictional element. As Judge

Cabranes has explained, instructions that the jury must make an independent finding of an "effect" on commerce; that the effect can be "very slight" and "'potential' rather than actual"; that commerce includes "all . . . commerce over which the United States has jurisdiction"; and that "[t]he United States' jurisdiction over commerce encompasses marijuana that is grown, processed, and sold entirely within a single state," all represent "no more than a summary of well established law." *United States* v. *Needham*, 604 F.3d 673, 688-689 (2d Cir.) (Cabranes, J., dissenting in part and concurring in part), cert. denied, 562 U.S. 955 (2010) (citations omitted). Such instructions preserve the jury's proper role in finding historical facts, applying the law as instructed by the judge to those facts, and finding whether each element of the offense has been proven beyond a reasonable doubt. Indeed, it would be anomalous to allow each jury in each case to make its own decision about whether the marijuana trade is "commerce over which the United States has jurisdiction." That question does not depend on the facts of any particular prosecution, should have the same answer in every case, and reflects a pure question of law.[7]

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[7] Petitioner did not challenge the district court's jury instructions below, see J.A. 82a; Pet. C.A. Br. 2, 9, 13-18, and failed to present any jury-instruction question for this Court's review, see Pet. i. Any claim of instructional error would therefore be forfeited and lie outside the question presented. Regardless, although the district court's instructions could have been more explicit, along the lines explained by Judge Cabranes in *Needham* (see 604 F.3d at 688-699 (dissenting opinion)), they were consistent with the legal principles described above. The district court instructed the jury that it could convict petitioner for Hobbs Act robbery only if it found the Act's jurisdictional element satisfied and accurately

b. Petitioner's remaining arguments are without merit. Petitioner argues, for instance, that "the pertinent inquiry" is whether the government established the Hobbs Act's affect-on-commerce element "*in this prosecution*" with "proof beyond a reasonable doubt" and the "[c]ongressional findings [in the CSA] cannot substitute for [such] proof" needed to establish the Act's jurisdictional element. Br. 23 (citation omitted). But congressional findings were not a "substitute" for any requisite proof in this case. Congress's findings in the CSA are relevant in deciding the purely *legal* question of whether the United States has regulatory jurisdiction over the intrastate marijuana trade. See *Raich*, 545 U.S. at 20-21; see also *Needham*, 604 F.3d at 688 (Cabranes, J., dissenting in part and concurring in part) (recognizing that, although the CSA differs from the Hobbs Act, "[t]hat does not mean * * * that *Raich* has no bearing on the definition of 'commerce' in the Hobbs Act"). But the resolution of that legal issue, as explained above, does not displace the jury's role in weighing the evidence and determining whether the Act's jurisdictional element has been proven beyond a reasonable doubt in this prosecution.

Petitioner appears to contend (Br. 3, 15-17) that the text of the Hobbs Act requires proof that "the specific personal property made the subject of the robbery affects commerce" because the Act's defini-

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defined that offense element. See p. 8, *supra*. The instructions also effectively instructed the jury that the marijuana trade is "commerce" under the Hobbs Act by stating that the government could carry its burden of proving an effect on commerce by proving that petitioner "reduced the movement of articles and commodities in interstate commerce, in this case, illegal drugs and drug proceeds." J.A. 63a.

tion of robbery in Section 1951(b)(1) requires proof of the taking or obtaining of "personal property." In petitioner's view (Br. 15) no such effect can be shown if the "personal property originat[ed] intrastate and never traveled interstate." The aggregation of the effect of such robberies as a "class," petitioner continues (Br. 16), cannot properly be "substitute[d]" for the Act's "specific personal property element" because doing so "creates an irrebuttable presumption of guilt." Those contentions misunderstand the Hobbs Act's requirements.

The Hobbs Act requires proof that the defendant affected "commerce" or the movement of an item "in commerce" "*by robbery*." 18 U.S.C. 1951(a) (emphasis added). Although robbery is defined in part by reference to the taking or obtaining of "personal property," 18 U.S.C. 1951(b)(1), it is the robbery, not the specific personal property taken, that must affect commerce. And as explained above, it is established law that purely intrastate activity can affect commerce when it belongs to a class of economic activity that, in the aggregate, has a substantial effect on commerce and that this form of analysis can be employed in a statute, such as the Hobbs Act, that invokes Congress's full commerce authority. See pp. 17-21, 22-24, *supra*. The robbery of a marijuana dealer of marijuana, even when the marijuana is produced and sold in one State, has such an effect.

C. The Evidence Is Sufficient To Establish That Petitioner Targeted Marijuana Dealers Whose Product Originated Out Of State

The court of appeals upheld petitioner's Hobbs Act convictions on the legal basis that Congress has regulatory jurisdiction over all marijuana distribution,

local as well as explicitly interstate. As discussed above, that holding is correct. But even without reliance on that theory, the evidence in this case was sufficient to support petitioner's Hobbs Act convictions because a reasonable jury could have inferred that the victim drug dealers had engaged in commerce crossing state lines.

When the government seeks to establish a case-specific effect on interstate commerce in a Hobbs Act case, it may do so in a variety of ways. For instance, as every court of appeals with criminal jurisdiction has held, proof that a robbery depleted the assets of a commercial enterprise that trades in out-of-state goods is sufficient to show an interference with interstate commerce because the depletion of assets will have at the very least a slight effect on that commerce by diminishing the enterprise's ability to engage in it. See, *e.g.*, *United States* v. *Ossai*, 485 F.3d 25, 30-31 (1st Cir.) (robbery of doughnut shop), cert. denied, 552 U.S. 919 (2007); *United States* v. *Elias*, 285 F.3d 183, 187-189 (2d Cir.) (robbery of grocery store), cert. denied, 537 U.S. 988 (2002); *United States* v. *Urban*, 404 F.3d 754, 764-765 (3d Cir.) (discussing depletion-of-asset precedents, including precedent concerning robbery of tavern), cert. denied, 546 U.S. 1030 (2005); *United States* v. *Tillery*, 702 F.3d 170, 174 (4th Cir. 2012) (robbery of dry cleaner), cert. denied, 133 S. Ct. 2369 (2013); *United States* v. *Robinson*, 119 F.3d 1205, 1212-1215 (5th Cir. 1997) (robberies of check-cashing stores), cert. denied, 522 U.S. 1139 (1998); *United States* v. *Smith*, 182 F.3d 452, 453, 456-457 (6th Cir. 1999) (robberies of grocery and party stores), cert. denied, 530 U.S. 1206 (2000); *Muratovic*, 719 F.3d at 813-814 (7th Cir.) (attempted robbery of trucking

business); *United States* v. *Dobbs*, 449 F.3d 904, 911-912 (8th Cir. 2006) (robbery of "'mom and pop' convenience store"), cert. denied, 549 U.S. 1139, and 549 U.S. 1233 (2007); *United States* v. *Nelson*, 137 F.3d 1094, 1102 (9th Cir.) (robberies of jewelry stores), cert. denied, 525 U.S. 901 (1998); *United States* v. *Curtis*, 344 F.3d 1057, 1069-1071 (10th Cir. 2003) (robberies of convenience stores and restaurants), cert. denied, 540 U.S. 1157 (2004); *United States* v. *Guerra*, 164 F.3d 1358, 1360-1361 (11th Cir. 1999) (robbery of gas station); *United States* v. *Harrington*, 108 F.3d 1460, 1468-1469 (D.C. Cir. 1997) (robbery of restaurant).

A robbery that impairs a business's ability to purchase equipment from out-of-state sources is sufficient for the same reason. See, *e.g.*, *United States* v. *Wilkerson*, 361 F.3d 717, 729-731 (2d Cir.), cert. denied, 543 U.S. 908 (2004); *United States* v. *Hebert*, 131 F.3d 514, 523-524 (5th Cir. 1997) (per curiam), cert. denied, 523 U.S. 1101 (1998); *United States* v. *Elders*, 569 F.2d 1020, 1025 (7th Cir. 1978). Likewise, proof that a commercial victim sells goods to out-of-state customers can establish the requisite effect on that commerce. See, *e.g.*, *United States* v. *Rodriguez*, 218 F.3d 1243, 1245 (11th Cir. 2000) (per curiam), cert. denied, 531 U.S. 1099 (2001); *United States* v. *Farrish*, 122 F.3d 146, 149 (2d Cir. 1997), cert. denied, 522 U.S. 1118 (1998).

Here, the trial record is sufficient to show an effect on commerce because the evidence supports the inference that petitioner attempted to steal marijuana and proceeds from the sale of marijuana that had *itself* traveled in interstate commerce. Although the court of appeals did not rest its decision on that ground, it

provides a sufficient basis on which to affirm the judgment below.

The court of appeals determined, and petitioner does not contest, that the trial evidence was sufficient to show that both Whorley and Lynch were marijuana dealers. J.A. 82a-83a. Whorley "admitted to having sold drugs in the past" and one of the investigating detectives "suspected Whorley of being a drug dealer" because Whorley's home had been robbed twice before and "drug dealers are commonly victims of repeated home invasions." J.A. 83a. Similarly, Lynch admitted that he "had sold drugs before the robbery without his wife's knowledge." J.A. 84a. And when Fitzgerald demanded that Lynch hand over his marijuana, Lynch did not deny his role in marijuana trafficking, asserting instead that "the marijuana was with another person." *Ibid.*

Several basic facts about the Roanoke drug trade in general and the targeted marijuana in particular support a rational inference that Whorley and Lynch sold marijuana that traveled in interstate commerce. The government's expert in drug trafficking explained that, in 2009, marijuana and cocaine were commonly sold in Roanoke. Tr. 63-64. Cocaine typically would "come[] into the City of Roanoke in bulk," specifically in kilogram-size "brick[s]" having a wholesale cost of $22,000 to $30,000. Tr. 64. A wholesaler purchasing such a brick would then "break it down" into smaller quantities for resale to other dealers. Tr. 64-65. Those downstream dealers would, in turn, break those smaller packages into gram-size user amounts, which were then sold for about $100. Tr. 66-67. Roanoke marijuana dealers used the same "bulk, wholesale, to a user amount" distribution process as cocaine dealers

in order to generate substantial cash profits. Tr. 68-69. In addition, such marijuana dealers could generate significant profits by selling "really good grade" marijuana, which was known in Roanoke as "exotic." Tr. 69. The government's evidence about Whorley and Lynch's marijuana distribution enterprises permitted the jury to fit each of these dealers into one of the two business models described by the expert: Whorley trafficked in high-end "exotic" marijuana, whereas Lynch was an upstream wholesaler who trafficked in large volumes of marijuana.

A reasonable jury could have inferred that Whorley's "exotic" marijuana was not an in-state product. "Exotic" is commonly understood to mean "from another country" and "not native to the place where found." *Webster's Third New International Dictionary* 798 (2002). That understanding is reinforced by evidence that such "exotic" marijuana is a high-grade product that has been bred to have a "really high THC" content, *i.e.*, a high concentration of "the active ingredient in marijuana." Tr. 69. The jury could rationally have concluded that such high-THC marijuana would likely have been produced by specialized growers located in a State or foreign country with a favorable climate.

Similarly, the Southwest Goonz targeted Lynch because he had previously been robbed of a bulk quantity—20 pounds—of marijuana. J.A. 74a. Cf. *Raich*, 545 U.S. at 31 n.41 (observing that "3 pounds of marijuana yields roughly 3,000 joints or cigarettes"). Petitioner himself admitted that he expected to find "pounds of weed" in the robbery. Tr. 420; see Tr. 354. The government presented expert testimony that the Roanoke marijuana trade was structured similarly to

the cocaine trade, with bulk amounts "com[ing] into" the Roanoke area. Tr. 64, 69; see p. 4, *supra*. The jury could have rationally inferred that the "pounds of weed" petitioner expected to find in Lynch's home would have been part of a bulk shipment containing marijuana brought into Virginia from another State or country.

Such evidence was sufficient to allow the jury to conclude that petitioner targeted marijuana dealers dealing in out-of-state marijuana. The robbery or attempted robbery of such dealers directly engaged in interstate commerce is an activity that will have at least a *de minimis* effect on interstate commerce or the movement of a commodity in such commerce thus satisfying the Hobbs Act's jurisdictional element.[8]

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[8] Petitioner briefly argues (Br. 16, 27) that the district court's *in limine* ruling erroneously prohibited him from presenting evidence to support a defense based on the contention that the marijuana dealers targeted for robbery may have dealt in intrastate marijuana grown locally in Virginia. That question should not be addressed by this Court because it lies outside the question presented. Petitioner mentioned the district court's *in limine* ruling as procedural history in his certiorari petition but rested the question presented and his argument for review exclusively on the alleged insufficiency of the evidence actually admitted. See Pet. i, 3-4, 7-14. Even if petitioner had challenged the *in limine* ruling in his petition (which he did not), "discuss[ing] th[at] issue in the text of his petition for certiorari [would] not [have] br[ought] it before [the Court]" because "Rule 14.1(a) requires that a subsidiary question be fairly included in the question presented." *Wood* v. *Allen*, 558 U.S. 290, 304 (2010) (citation, emphasis, and brackets omitted). Although the analysis underlying the sufficiency and *in limine* questions may share some common elements, a "question which is merely 'complementary' or 'related' to the question presented * * * is not 'fairly included therein.'" *Izumi Seimitsu*

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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Kogyo Kabushiki Kaisha v. *U.S. Philips Corp.*, 510 U.S. 27, 31 (1993) (per curiam) (citation omitted).

APPENDIX

18 U.S.C. 1951 provides:

Interference with commerce by threats or violence

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both.

(b) As used in this section—

(1) The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

(3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside

thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

(c) This section shall not be construed to repeal, modify or affect section 17 of Title 15, sections 52, 101-115, 151-166 of Title 29 or sections 151-188 of Title 45.

No. 14-6166

IN THE

Supreme Court of the United States

DAVID ANTHONY TAYLOR,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF

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INTRODUCTION

The Hobbs Act's plain text resolves this case. When a robbery occurs there can be no violation of the Hobbs Act unless (a) commerce is obstructed, delayed or affected or (b) the movement of an article or commodity in commerce is obstructed, delayed or affected by the robbery. The impact on commerce is an element of the offense that requires particularized evidence of an effect on interstate commerce beyond a reasonable doubt.

The very language of the Hobbs Act dictates that the government must show an effect on interstate commerce. The government argues that the robbery of a drug dealer whose drugs are subject to regulation pursuant to the Controlled Substance Act, is as a matter of law violative of the Hobbs Act. Adopting the government's argument, nothing other than the fact that that the victim is a "drug dealer" is required to prove the element of "effect on interstate commerce" required for a Hobbs Act violation.

The language of the Hobbs Act does not envision this limited showing. Unlike the Controlled Substance Act, which is a regulatory act, the Hobbs Act requires proof beyond a reasonable doubt of certain elements. The government's proof should have focused on the nature of the business, if any, robbed and how the robbery affected its operation in interstate commerce; that is to say, that both Worley and/or Lynch sold drugs from an out-of-state source and that the robbery of the money and drugs depleted the assets of their business.

A plain reading of the Hobbs Act suggests that the robbery of "any article or commodity" must affect

commerce in some manner. An article or commodity produced intrastate, may or may not have such an effect depending on other factors required to be shown.

The government seeks to expand its prosecutorial authority beyond what the text of the Hobbs Act can bear by creating a *per se* rule of guilt, an attempt the Court should reject by reversing the decision below. Such an expansion would transform every robbery and extortion which are quintessential state crimes, into federal offenses.

ARGUMENT

1. The Government Has No Answer to The Hobbs Act's Plain Text.

The plain text of the Hobbs Act requires the robbery of personal property from the person of another that affects commerce or the movement of an article or commodity in commerce. Proof of two elements are necessary for conviction (1) the property taken must affect commerce or the movement in commerce of the property taken is affected and (2) robbery of the person in possession of the property.

A. The Government's Attempts To Show The Evidence is Sufficient To Show That The Robberies Of Marijuana Dealers Affected Commerce For Hobbs Act Jurisdiction Fails.

During its case in chief the government presented testimony from seventeen witnesses, among them Special Agent Billy Cunningham ("SA Cunningham"), Bureau

Alcohol, Tobacco and Firearms ("ATF"), J.A.-A, p. 5a; Record 160, p. 41-46 and Record 161, p. 413-444; Officer Kenny Garrett ("Office Garrett"), Roanoke City Police Department, J.A.-A, p. 5a; Record 160, p. 58-77; Office Betsy Van Patton ("Office Patton"), Roanoke City Police, J.A.-A, p. 5a; Record 160, p. 123-161, all qualified as experts in the field of narcotics distribution. It is significant to note that at no time were either of these witnesses questioned regarding the origins and transportation of cocaine and/or marijuana into the Commonwealth of Virginia. There was no evidence produced from either of these experts from which the jury could find or infer that either of the two mentioned drugs were transported into the Commonwealth or in any way affected commerce.

SA Cunningham was questioned regarding his investigation and contacts with certain witnesses, victims and Taylor. He was never questioned regarding the origin of drugs, transportation, possession or sale of drugs. He was however questioned regarding an admission by one of the victims, W. T. Lynch , regarding a single drug transaction. The testimony was related to a single drug transaction involving $4,200 of which his wife had no knowledge. J.A.-A, p. 5a; Record 161, p. 443-444. Other than this one isolated transaction no other evidence was developed regarding drug dealing by Lynch, including but not limited to origin of drugs, quantity of drugs, cash, assets or the depletion of assets.

Office Garrett qualified as an expert regarding drug trafficking, drug trafficking trends, and drug prices as of 2009. J.A.-A, p. 5a; Record 160, p. 62. After being so qualified he testified that cocaine and marijuana were the most common drugs for sale on the streets of

Roanoke, Virginia. J.A.-A, p. 5a; Record 160, p. 63-64. He proceeded to testify concerning cocaine, the quantity, cost, repackaging for street sale and value. J.A.-A, p. 5a; Record 160, p. 64-68. Similar, but limited, testimony was offered regarding the sale and distribution of marijuana. J.A.-A, p. 5a; Record 160, p. 68-69. The government offered no evidence to support an interstate nexus for the Worley and Lynch robberies. No proof was offered by the government that the marijuana allegedly sold by the victims had originated out of state, that the victims themselves crossed state lines in conducting their business or that the robbery depleted assets that would have purchased goods in interstate commerce. Finally the government did not provide testimony of any kind about marijuana production or its origin. The government's answer to this failure is premised on the ability of a reasonable jury to "infer" the drugs in question crossed state lines. Gov. Br. 33. Additionally the government suggests that a reasonable jury could "infer" that "exotic" marijuana was not an in-state product but rather produced by specialized growers located in a State or foreign country with a favorable climate (Gov. Br. 36) or that "pounds of weed" would have been part of a bulk shipment containing marijuana brought into Virginia from another State or country. Gov. Br. 37. Each inference having no rational connection between the fact proven and the ultimate fact presumed.

This Court has concluded that "statutory presumptions cannot be sustained if there is no rational connection between the fact proved and the ultimate fact presumed, if the inference of the one from proof of the other is arbitrary because of lack of connection between the two in common experience." *Leary v. United States*, 395 U.S. 6, 33 (1969). *Tot v. United States*, 319 U.S. 463, 467-68

(statutory presumption could not be sustained if there [were] no rational connection between the fact proved and the ultimate fact presumed, if the inference of the one from proof of the other [was] arbitrary because of lack of connection between the two in common experience). Granted this is not an issue of statutory presumption, however the Government's argument that the jury could infer that the victim drug dealers had engaged in commerce crossing state lines is subject to the same "rational connection" standard as set forth in *Leary, supra* and *Tot, supra*. When applied to the testimony at trial there were no underlying facts proven on which the jury could make a "rational" inference that the marijuana was transported interstate or in any way obstructed, delayed or affected commerce.

To further bolster its argument the government cites numerous cases supporting the depletions of assets theory to establish a Hobbs Act conviction. However, testimony in the cited cases, unlike the evidence here, established an interstate nexus supporting the Hobbs Act convictions. A review of the facts of some, but not all, the cited cases reveal the following:

United States v. Ossai, 485 F.3d 25, 30 (1st Cir. 2007) cert. denied, 552 U.S. 919 (2007). Testimony on direct examination that, had Ossai not stolen the $782, the funds would have been deposited in the owner's bank account the next day, and the owner would have used the deposited money to run the business, which necessarily required the ordering of products manufactured outside of New Hampshire.

United States v. Elias, 285 F.3d 183, 188 (2nd Cir. 2002). Evidence offered that Aybar Grocery sold beer produced outside the United States and fruit grown outside New York.

United States v. Urban, 404 F.3d 754, 762, (3rd Cir. 2005), cert. denied, 546 U.S. 1030 (2005). Evidence presented that defendants accepted tips from plumbers who purchased supplies made out-of-state, i.e. Pennsylvania.

United States v. Tillery, 702 F.3d 170, 174 (4th Cir. 2012), cert. denied, 133 S. Ct. 2369 (2013). In order to operate, Swan Dry Cleaners had to purchase most of its supplies from out-of-state; which included purchasing cleaning solvents from Illinois; hangers from Alabama, Mexico, Vietnam and China; spotting chemicals from Illinois and Missouri; gown boxes from Illinois; detergent from North Carolina; starch from Missouri; boiler conditioner from Illinois; and plastic garment bags from South Carolina.

United States v. Robinson, 119 F.3d 1205, 1208 (5th Cir 1997), cert. denied, 522 U.S. 1139 (1998). The robbery victims provided check-cashing services for out-of-state checks, payroll checks, and government benefit checks. Evidence presented that the stores sold products that had been shipped to Texas from other states.

United States v. Smith, 182 F.3d 452, 455 (6th Cir. 1999), cert. denied, 530 U.S. 1206 (2000). Testimony established that all the stores robbed by defendants dealt primarily, or at least significantly, in beer, wine, and cigarettes. ATF agents testified that tobacco and alcohol products, with few exceptions, are manufactured outside of Michigan and must be transported there for sale.

United States v. Dobbs, 449 F.3d 904, 908 (8th Cir. 2006), cert. denied, 549 U.S. 1139, and 549 U.S. 1233 (2007). Testimony from the representative from a wholesale supplier for the victim testified that most of the products his company sold to the victim were produced outside of Iowa. A beverage supplier's representative testified that the products his company supplied the victim were produced outside of Iowa. Movie rental records showed that many of the victim's customers were from outside Iowa.

United States v. Nelson, 137 F.3d 1094, 1102 (9th Cir. 1998), cert. denied, 525 U.S. 901 (1998). Evidence presented that the victims were commercial businesses actively engaged in interstate commerce at the time of the robberies. Testimony established that the victims conducted approximately 95 percent of their business with out-of-state firms. 90 percent of the merchandise sold by the victims was manufactured outside the state of California.

Each of the substantive robberies charged in the Indictment, for which Taylor stands convicted, involved only marijuana and drug proceeds from its sale. J.A. 11a-14a. The record clearly demonstrates that neither marijuana nor drug proceeds were obtained as a result of the robberies. The robbery at 3030 Parham Drive (Lynch Residence) netted a cell phone. J.A.-A, p. 5a; Record 161, p. 377. The robbery at 3343 Ridgerun (Worley Residence) netted $40, a cell phone, necklace and ring. J.A.-A, p. 5a; Record 160, P. 218-219. No estimate of value of the cell phones or jewelry were offered into evidence. Nor was it established that either the cell phones or jewelry had an affect on commerce. The government offered no evidence

and can point to no evidence suggesting a depletion of assets of either Lynch or Worley.

The government offered no evidence to support an interstate nexus for the home invasions. Both Lynch and Worley denied they were drug dealers at the time of the robberies. Lynch, unbeknownst to his wife, admitted to a one time sale of marijuana to investigators. J.A.-A, p. 5a; Record 161, p. 444-445. Worley admitted to a single marijuana transaction approximately 2 years prior to robbery and denied selling marijuana at any time thereafter. J.A.-A, p. 5a; Record 160, p. 173. A single isolated sale of drugs, removed in time for the alleged acts of Taylor is insufficient to support the conclusion that Lynch and/or Worley were engaged in the business of marijuana trafficking. Assuming arguendo that both Lynch and Worley were marijuana dealers, a point Taylor does not concede, the government presented no proof that the marijuana sold by the victims had originated out of state, that it was sold or intended to be sold to out-of-state customers, that Lynch or Worley themselves crossed state lines to conduct business, or that the robberies depleted assets that would have purchased commodities in interstate commerce. Similarly the government offered no proof as to how the robberies, if successful, might have affected the business enterprise. The government's proof is too lacking to establish the required interstate nexus. *United States v. Needham*, 604 F.3d 673 (2nd Cir. 2010), cert. denied, 562 U.S. 901 (2010).

More significantly, the government did not provide testimony of any kind about marijuana production and trafficking in Virginia. Like many legal products marijuana may be grown, processed and sold entirely within Virginia. *United States v. Peterson*, 236 F.3d 848,

855 (7th Cir. 2001) (finding that the government failed to demonstrate victim's marijuana trade involved drugs origination out of state and vacating Hobbs Act conviction). Reports documenting the frequency and scale of in-state marijuana production, often implicating thousands of dollars, are abundant.[1]

CONCLUSION

The judgment of the court of appeals should be reversed, and the case remanded for further proceedings.

Respectfully submitted,

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1. *See, e.g.*, U.S. Drug Enforcement Administration, *Cannabis Eradication*, http://www.dea.gov/ops/cannabis.shtml (reporting the seizures in Virginia of more than 47,000 marijuana plants in 2010; 28,000 marijuana plants in 2011; 11,000 marijuana plants in 2012; 12,000 marijuana plants in 2013 and more than 11,000 marijuana plants in 2014); David Seidel, Assistant News Director WDBJ 7 Roanoke July 5, 2013 (reporting the seizure of 6,252 marijuana plants in Highlands County Virginia), http://www.wdbj7.com/news/local/highland-county-raid-nets-6353-suspected-marijuana-plants Evan Jones, WFIR News Radio, March 18, 2011 (reporting the seizure of 500 marijuana plants in Botetourt County, Virginia) http://wfirnews.com/local-news/1-5million-marijuana-bust-in-botetourt-county